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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. [redacted] 19

UNITED STATES OF AMERICA,
Appellees,

vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,
Appellants.

On Appeal From the United States District Court for the Northern District of California, Southern Division

APPELLANTS' JURISDICTIONAL STATEMENT

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Appellants.

On Appeal From the United States District Court for the Northern District of California, Southern Division

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JURISDICTIONAL STATEMENT

Appellants appeal from the order of the United States District Court for the Northern District of California, dated and entered March 27, 1961, and from the orders and injunctions dated April 17, 1961, and entered April 18 and 19, 1961, permanently enjoining California officials from enforcing the California milk stabilization act against dairy farmers

and distributors with respect to milk sold to the United States at Castle and Travis Air Force Bases (action #39073), and the Oakland Army Terminal (action #39030). This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeals and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court for the Northern District of California, Southern Division, is reported in 190 F. Supp. 645. Copies of the opinion, order regarding findings, and the judgments are attached hereto as Appendix "A".

JURISDICTION

These suits were brought under 28 U.S.C. 1331 and 1345 to enjoin the enforcement of the California milk stabilization act (Ch. 17, Div. 6, Calif. Agr. Code), as unconstitutional. The permanent injunctions of the three judge District Court were entered on April 18 and 19, 1961, and notice of appeal to this Court was filed in that Court on April 26, 1961. By Order entered June 7, 1961, the District Court extended appellant's time for docketing the appeals and filing the record on appeal with the Clerk of the United States Supreme Court to and including July 24, 1961. Appendix p. 67.

Since appellee's complaints sought injunctions against enforcement of the state statute on grounds of federal unconstitutionality, the actions were re-

quired to be heard by a three-judge District Court under 28 U.S.C. 2281, and this Court has jurisdiction of these direct appeals under 28 U.S.C. 1253.

Florida Lime Growers v. *Jacobsen*, 362 U.S. 73, 74-75 (1960).

California Comm'n v. *United States*, 355 U.S. 534, 536 (1958).

James v. *Dravo Contracting Co.*, 302 U.S. 134, 138 (1932).

QUESTIONS PRESENTED

1. Whether enforcement of the provisions of the California milk stabilization act authorizing the establishment by the State Director of Agriculture of minimum prices at which dairy farmers may sell and distributors may purchase milk conflicts with the Armed Services Procurement Act of 1947.
2. Whether enforcement of the provisions of the California milk stabilization act authorizing the establishment by the State Director of Agriculture of minimum prices at which distributors may sell milk conflicts with the Armed Services Procurement Act of 1947.
3. Whether enforcement of the provisions of the California milk stabilization act against distributors or dairy farmers whose milk is sold to the United States at three particular military installations is constitutional.
4. Whether the District Court erred in permanently enjoining enforcement of the California milk stabilization act as unconstitutional without trial and

on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073) where the pleadings and affidavits raised issues of material facts.

5. Whether the District Court erred in failing to abstain from final decision pending construction by the California Supreme Court of the California milk stabilization act and California statutes relating to the acquisition of land and jurisdiction by the United States, and in enjoining appellants from proceeding in pending state court actions.

STATUTES INVOLVED

California statutes:

California milk stabilization act, Chapter 17, Division 6, Agricultural Code; Section 34, 1872 Political Code, as amended by Statutes of 1937, Chapter 710, page 2231 (Sec. 111, Gov. C); Statutes of 1897, Chapter 56, page 51 (Sec. 114, Gov. C); Section 113, Government Code, as amended Statutes 1947, Chapter 1532, page 3164; Section 126, Government Code, as amended Statutes 1947, Chapter 1532, page 3163.

Federal statutes:

Constitution, Article I; Section 8, Clause 17; Armed Services Procurement Act of 1947, 62 Stat. 21, 10 U.S.C. 2301 et seq.; Lanham Act, 54 Stat. 1125; Section 355 Revised Statutes, as amended, Act of October 9, 1940, 54 Stat. 1083.

Copies of these statutes are set forth in Appendix B hereto.

STATEMENT

The California milk stabilization act, Cal. Agr. Code, Div. 6, Ch. 17, was enacted in 1935 to regulate California's dairy industry. Pursuant to this act, the Director of Agriculture has established (1) minimum prices at which dairy farmers may sell and distributors may purchase milk, and (2) minimum prices at which distributors may sell milk.

In early 1960 the Director of Agriculture brought several actions against milk distributors, charging some with purchasing milk from dairy farmers at prices below the established minimum prices,[1] and some with selling milk at prices below the established minimum prices.[2] The ultimate purchaser of the milk was in most instances the United States.

The United States then brought the present actions in the United States District Court for the Northern District of California, Southern Division, to restrain the Director of Agriculture and the

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[1] *Warne* v. *Milk Producers Assn.*, Stanislaus County Superior Court No. 69395, R 921.

Jacobsen v. *Superior Milk Producers Assn.*, Los Angeles County Superior Court No. 734400, R 934.

Warne v. *Challenge Cream & Butter Assn.*, Los Angeles County Superior Court No. 732752, R 945.

[2] *Warne* v. *Milk Producers Assn.*, Merced County Superior Court No. 28301; Judgment for plaintiff entered Aug. 11, 1960, finding Castle Air Force Base to be within territorial jurisdiction of California; now on appeal to District Court of Appeal, California Third Appellate District, No. 10185, R 704, 831-831A, 964.

Warne v. *Milk Producers Assn.*, Alameda County Superior Court No. 304730, R 100.

Attorney General of the State of California from enforcing the California milk stabilization act with respect to milk ultimately purchased by the United States at Oakland Army Terminal, Travis Air Force Base, and Castle Air Force Base. The three judge District Court issued the requested injunctions on two grounds. It held that the California milk stabilization act conflicts with the Armed Services Procurement Act of 1947, 62 Stat. 21, and that the United States had acquired exclusive legislative jurisdiction over these bases.

By order entered in both actions March 27, 1961, the Court below adopted its memorandum decision entered November 29, 1960, as sufficient to constitute its findings of fact and conclusions of law. Appendix p. 61. Appellants assert that the record flatly contradicts these findings in material respects. See infra p. 24.

THE QUESTIONS ARE SUBSTANTIAL

I. The Questions are Important to States Having Milk Stabilization Statutes.

The legislative objective of the California statute is to eliminate destructive and unfair economic practices, and to insure to producers the necessary costs of production. *In re Willing*, 12 Cal. 2d 591, 594.

Twenty-two states have enacted milk stabilization statutes similar to California's.[3] The authority of these states to protect the distributor and the dairy farmer from destructive price wars carried on between distributors competing for contracts with federal military installations hinges upon a determination of the validity of the California enactment.

Farmers whose milk is sold by distributors to the United States had been receiving $5.19 per hundredweight of milk; since the District Court's decision, returns to dairy farmers have dropped to a low of $2.75 per hundredweight. R 831, 857-859. These returns are below the cost of production and thereby threaten a dairy farm investment within California of approximately one billion dollars. R 854, 857. These below cost sales of approximately thirty million gallons of fresh milk per year (6% of total California sales) will cause dairy farmer losses in excess of $6,900,000.00 annually. R 324, 419, 860. These dairy farmer losses are not equally shared, but are borne by those farmers who sell to distributors with federal milk contracts. R 857. This unjust discrimination

[3] Citations to the state statutes are attached hereto as Appendix C.

undermines the effectiveness of the California milk stabilization act. R 860. Retail grocery stores are discriminated against since the price which they pay for the milk at wholesale (e.g. 20.12¢ qt.) is higher than the retail sales price at the commissary (e.g. 12¢ qt.). R 805, 862. These discriminations violate the general principle that the beneficiaries of federal rights are not to have a privileged position over others in their relations with the states. See *Board of Comm'rs.* v. *United States*, 308 U.S. 343, 352 (1939).

II. The District Court Injunction Extends Immunity From State Regulation Beyond Existing Precedents.

The District Court in this case enjoined the defendant state officers from enforcing with respect to milk purchased by the United States:

> "either the state minimum producer price, [or] wholesale price . . . regulations promulgated by the Director of Agriculture pursuant to the California Milk Stabilization Act." Appendix pp. 64 and 66.

This sweeping injunction carries the immunity from state regulation beyond persons who contract with the United States to include the supplier of those persons.

In issuing this injunction, the District Court abandoned the careful reasoning of this Court in *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943). There it was held that the State could not punish, directly or indirectly, a distributor for selling milk to the United States at prices below the state minimum prices if

the sale occurred on an area (Moffett Field) subject to exclusive federal jurisdiction. In the present actions the District Court held that the State may not punish dairy farmers for selling or distributors for purchasing milk below the state minimum prices, even though these sales obviously occur outside the areas (the three bases) claimed subject to exclusive federal jurisdiction.

This expansion by the District Court of an immunity from state law of sales occurring within a federal enclave to prior sales occurring outside the enclave is without precedent. Yet the opinion of the District Court does not even mention this issue.

III. The District Court Decision Conflicts With Penn Dairies, Inc. v. Milk Control Comm'n 318 U.S. 261.

The District Court held that the California milk stabilization act as applied, conflicted with the paramount Armed Services Procurement Act of 1947, 55 Stat. 22. This holding conflicts with *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261 (1943), in which this Court held that the Pennsylvania minimum wholesale milk price regulations, similar to the California wholesale regulations, did not conflict with the Federal defense procurement statutes and regulations.

The District Court declined to follow the *Penn Dairies* case, relying instead on *California Comm'n* v. *United States*, 355 U.S. 534 (1958). The court said:

"We conclude, therefore, that even if the *Penn Dairies* case has not been in effect overruled by

the *Public Utilities* case, it is inapplicable here because the California Milk Stabilization Act "*places a prohibition on the Federal Government*" within the meaning of the *Public Utilities* case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2." (Emphasis added). *United States* v. *Warne*, 190 F. Supp. 645, at 657. Appendix p. 54.

The District Court attempted to distinguish *Penn Dairies* by construing the California milk stabilization act as applying to federal procurement officers. Yet California's highest court declared in *Pacific Coast Dairy* v. *Dept.* that "the act regulates not the army but the distributors." 19 Cal. 2d 818, 830, rev'd on other grounds, 318 U.S. 285 (1943).

The trial court relied solely upon *California Comm'n* v. *United States*, 355 U.S. 534 (1958), affirming 141 F.Supp. 168 (N.D. Cal., S.D. 1956), in which California's proposed utility rate regulation was determined to impose an unreasonable burden on the operation of the federal government and conflict with federal procurement regulation. But the trial court in the *California Comm'n* case had found that the proposed utility rate regulation would unduly delay military shipments, render procurement operations an administrative morass, and endanger national security by forcing disclosure of the contents of military shipments. California's milk price regulation merely necessitates the awarding of procurement contracts on a rotation basis when bids are identical and

increases in a non-discriminatory manner the cost of operating the federal government. 32 C.F.R. 2.406-4 (award of bid by lot).

This Court in *Penn Dairies*, at 272, concluded "that while these [procurement] statutes direct government officials to invite competitive bidding . . . . and also require them to accept the lowest responsible bid . . ., they do not purport to set aside local price regulations. . . ." When the procurement statutes were codified in 1947, Congress evinced no intention to change the result of *Penn Dairies*.[4]

In their brief on the merits, appellants will urge that Penn Dairies and the present case should be further distinguished from California Comm'n. because of the greater disruptive effect of federal immunity on state milk stabilization laws and the minimal impact of such enactments on federal procurement practices.

IV. The Decision Conflicts With Congressional Policy.

In striking down the California milk stabilization act, as applied, the District Court withdrew state protection from the dairy farmer, a class of persons whose welfare has been expressly considered by Congress. Section 204(a), of the Agricultural Act of 1954, 68 Stat. 899, declares:

[4] The Armed Services Procurement Act of 1947, 55 Stat. 22, codified the procurement statutes without substantive change in effect at the time of the *Penn Dairies* decision. See House Report #109, 80th Cong., 1st Sess., p. 6. No material changes have been found in the current procurement regulations as compared to those considered in the *Penn Dairies* case.

> "It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products . . . and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy."[5]

There is no indication that implementation of this policy was to be confined to the federal government. No conflict with state law is present since the purpose of the California statute is to afford a measure of economic security to dairy farmers in the interest of protecting the public milk supply. *In re Willing*, 12 Cal. 2d 591, 594.

V. The Decision Is Inconsistent With Decisions of This Court Sustaining State Taxation And Safety Regulation Of Contractors With The Federal Government.

This judgment of the District Court also goes beyond the precedents which recognized that state laws may impinge on contractors with the United States where the impact upon the government is solely economic, is non-discriminatory, and is merely reflected in increased costs.[6]

[5] This policy is implemented by subsidizing the consumption of fresh milk by school children. National School Lunch Act, 60 Stat. 230; Act of July 9, 1958, 72 Stat. 276. The allocation to California is approximately twelve and one-half million dollars annually. School Lunch Program, California. Superintendent of Public Instruction, August 1, 1960, p. 1.

[6] 70% of total volume is purchased for resale through commissaries, and any increase in costs would be passed on to the commissary patron. Section 513, Department of Defense Appropriation Act, 1961, 74 Stat. 330, 352. R 805, 814, 816-817. 30% of total volume is purchased with appropriated monies for troop issue. R 814, 816-817.

This concept has been used in sustaining nondiscriminatory state taxes on federal contractors. *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958), (privilege tax); *Smith* v. *Davis*, 323 U.S. 111 (1944) (property tax on open account); *Curry* v. *United States*, 314 U.S. 14 (1941), (sales tax); *Alabama* v. *King Boozer*, 314 U.S. 1 (1941) (sales tax); *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937) (gross receipts tax); *Offutt Housing Co.* v. *Sarpy County*, 351 U.S. 253 (1956) (personal property tax on area located within federal jurisdiction). See 32 C.F.R. 12.103 establishing policy that contractors with the government cooperate "to the fullest extent possible" with state agencies responsible for enforcing safety, health and sanitation, maximum hours, minimum wages, equal pay for women, child and convict labor laws.

VI. Absent Conflict, the California Milk Stabilization Act was Assimilated as Federal Law on the Military Installations in Question.

Absent conflict with federal statute, the laws of the state existing at the time of the surrender of sovereignty are carried over into the law of the federal area. This assimilation of state law assures that the area involved will continue to have a developed legal system. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99 (1940); *Chicago, R.I. & P.R. Co.* v. *McGlinn*, 114 U.S. 542, 546 (1885). The application of this rule to state regulatory acts was recognized in *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, the Court saying:

> "When the federal government acquired the tract [Moffett Field], local law not inconsistent with federal policy remained in force until altered by national legislation." 318 U.S. 285, 294.

Assimilation was found inapplicable however, because the California milk stabilization act was adopted after the transfer of sovereignty. In this case, this reverse is true. The transfers of sovereignty found by the District Court occurred subsequent to 1941, long after the 1935 enactment of the milk stabilization act. California Statutes of 1935, Chapter 241, page 922, as amended by Statutes of 1937, Chapter 3, page 42. Appendix p. 67. It follows that, absent conflict, the California act remained in force in the three enclaves directly in question and that California may apply its minimum milk price regulations to the distributor with respect to the sale of milk occurring on the military bases here involved.

VII. The District Court Has Erroneously Decided Important Questions With Respect to the Application of California Law Over Its Many Federal Installations.

There are three types of state statutes dealing with state-federal jurisdiction over federal areas within state borders. They are:

(1) Statutes which grant consent to the United States to acquire land within a state.

(2) Statutes which make a tender of territorial jurisdiction, partial or exclusive, of federally owned land to the United States.

(3) Statutes which both consent to the acquisition of land, and grant territorial jurisdiction, partial or exclusive, to the United States over the land so purchased with consent.

The determination of the jurisdictional status of the military installations here involved hinges on the construction of California statutes coming within these categories.[7]

In *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293, the court and the parties assumed, without considering the language of the state statutes, that the United States had acquired exclusive jurisdiction over the military base there involved. In this appeal, appellants will contend that the state exercises jurisdiction over the federal installations here in question.

A. The District Court below interpreted the California statute (enacted in 1872) which granted state consent to the federal purchase of military land as having transferred exclusive jurisdiction to the United States over the Travis and Castle Air Force Bases. Appendix, p. 42. This statute, Section 34, 1872, Calif. Pol. C. provided in part:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts,

[7] The decision here will also largely determine the jurisdictional status of the 280 military installations on four million acres of land in California. Inventory Report, U.S. General Services Administration, November 10, 1959; *R* 158.

magazines, arsenals, dockyards, and other needful buildings . . ."[8]

Appellants contend that this 1872 statute in granting consent to federal acquisition of land did not constitute a cession of territory since it contained no words of cession. Instead, The California Legislature intended to give the consent to purchase land required by Constitution, Article I, section 8 clause 17. "It would seem to have been the opinion of the framers of the Constitution that, without the consent of the states, the new government would not be able to acquire lands within them; . . ." *Fort Leavenworth R. R. Co. v. Lowe*, 114 U.S. 525, 530. See debate excerpts, 1787 Constitutional Convention, Appendix p. 136. This consent to purchase, when given, makes the area involved subject to the power in Congress to exercise supremacy jurisdiction thereover. But this grant of supremacy power is not per se exclusory and becomes effective only as Congress chooses to avail itself of it. State law remains in force until controlling federal statute is enacted. See *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 260. This is the construction given to the remaining grants of power in Constitution, Article I. *Parker v. Brown*, 317 U.S. 341, 361-363 (1943; commerce clause). The distinction drawn here is between a state statute which subjects land within state borders to such federal supremacy jurisdiction as Congress

[8] Section 34, 1872 California Political Code, as amended by California Statutes of 1939, Chapter 710, page 2231, together with its legislative history is set out in the Appendix, page 104.

sees fit to exercise, and a statute making a transfer of territorial jurisdiction. Congress recognized this distinction in retroceding "jurisdiction and sovereignty" over a tract of land in the District of Columbia to the State of Virginia, but reserving the power to "exercise exclusive legislation" over the area while in government possession. Act of February 23, 1927, 44 Stat. 1176. It is noted that, exclusive of the Armed Services Procurement Act of 1947, no contention is made by appellee that federal statute conflicts with the California milk act as applied to sales of milk at wholesale occurring on the Castle and Travis Air Force Bases.

The language of the 1872 statute is contrasted with that of California's statutes of 1897, Chapter 56, page 51, which appellants concede is a cession statute. This statute provided:

> "State of California hereby cedes to the United States of America exclusive jurisdiction over all lands . . . which may hereafter be . . . conveyed for military purposes; provided that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated: . . ."[9]

Having determined that the 1872 statute transferred sovereignty to the United States, the District Court did not consider the effect of the failure of the United States to file land descriptions and plats with

[9] Statutes of 1897, Chapter 56, page 51, together with its legislative history, is set out in the Appendix, p. 105.

the appropriate county recorder as required by the 1897 statute. R 424-425; 428-429; 814, 816. These filing and land description requirements have been held to constitute a condition precedent to the transfer of sovereignty. *United States* v. *Watkins*, 22 F.2d 437, 440, (D.C., N. D. Calif. 1927). The fulfillment of the condition insures that state and federal officials, and the general public, would have notice of exactly where the parcels of land within federal jurisdiction are located. *Valley County* v. *Thomas*, 109 Mont. 345, 97 Pac.2d 345, 360, (the Montana cession statute "must not be construed as to make possible a no-man's land within the boundaries of the state"). Accord: *Pothier* v. *Rodman*, 291 F. 311, 319-21 (1st Cir. 1923), rev'd on a different ground, 264 U.S. 399; *Gill* v. *State*, 141 Tenn. 379, 210 S.W. 637, 638 (1919); *State* v. *Mendez*, 57 Nev. 192, 61 Pac.2d 300, 303 (1936); *Six Cos.* v. *De Vinney*, 2 F.Supp. 693, 696 (D.C. Nev. 1933)[10]

While there is no California decision which considers whether the 1897 "cession" statute qualified the earlier 1872 "consent" statute, this Court in a similar context concluded that a West Virginia 1919 "cession" statute qualified the earlier 1881 "consent" statute. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 143 (1937); Sec. 4, Ch. 20, 1881 Acts of W.

[10] We are informed that the Judge Advocate General, Department of the Army, has expressed the opinion that letters accepting jurisdiction over military lands in California sent to the state Governor were insufficient because unaccompanied by the filing of maps and metes and bounds descriptions as required by the 1897 statute. Opinion SPJGR 1945/9595, dated October 23, 1945; Opinion JAGR 1954/2153, dated April 9, 1954.

Virginia; Sec. 19, 1919 Code of W. Virginia; both statutes codified into Sec. 3, Ch. 1, Art. I, 1931 Code of W. Virginia. Since the government failed to comply with the filing and land description requirements of the 1897 statutes, appellants assert that California continues to exercise jurisdiction over the Castle and Travis Air Force Bases. R 836-D.

B. Federal statute provides "it shall be conclusively presumed" that jurisdiction has not been accepted by the United States unless exclusive or partial jurisdiction were accepted "by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." Section 355, 1875 Revised Statutes, as amended, Act of October 9, 1940, 54 Stat. 1083.

The United States in its brief filed with the Court in *Adams* v. *United States*, October term, 1942, #889, pp. 16-18 [319 US 312], after acknowledging the Department of Justice was the draftsman stated that:

> ". . . all confusion should be eliminated by requiring an unequivocal act of acceptance, such as the filing of a notification with the Governor of the state which had already been required by some state statutes [11] or by compliance with any equivalent procedure which the states might provide, such as the recordation of maps or plats." [12]

[11] Article 1639, 1849 Laws of Texas, required the filing of a metes and bounds description of the enclave with the Governor as a condition to the cession of jurisdiction.

[12] State cession statutes requiring the recordation of metes and bounds description, and a plat, of the enclave include: Sec. 20, 1917 Statutes of Washington. *Pothier* v. *Rodman* (1st Cir.),

In the light of this legislative history, appellants will contend that the District Court erred in finding that the war department letters to the Governor of California accepting jurisdiction over "all lands acquired . . . for military purposes within the State of California" transferred exclusive jurisdiction over Castle and Travis Air Force Bases, since the filing and lands descriptions requirements of state law which were incorporated into the federal statute, were not met. R 320, 424, 428-429, 448.

C. The only area at Castle Air Force Base claimed by appellee to be within federal jurisdiction is an 18.36 acre tract of land (denoted Tract A) acquired for civilian housing pursuant to the Lanham Act, 54 Stat. 1125. R 191. Section 10 of this Act provided that "notwithstanding any other provision of law" the acquisition of real property under the Act shall not deprive the State of civil or criminal jurisdiction over the property. Appellants assert that the language "notwithstanding any other provision of law" was intended to qualify the authority given in the earlier Act of October 9, 1940, 54 Stat. 1083, which authorized the government to accept jurisdiction by complying with the appropriate state cession law filing requirements. Congress in enacting section 10 intended to assure to residents of Lanham housing tracts the bene-

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291 Fed. 311, 320, rev'd on other grounds, 264 U.S. 399; Sec. 1, Ch. 110, 1895 Acts of Tennessee, *Gill* v. *State*, 141 Tenn. 379, 210 S.W. 632, 638; Sec. 2, Ch. 23, 1921 Statutes of Nevada, *State* v. *Mendez*, 57 Nev. 192, 61 P. 2d 300, 303; Calif. Stats. 1897, Ch. 56, p. 51, *United States* v. *Watkins*, 22 Fed. 2d 437, 440.

fits of state citizenship, e.g. the right to vote. *Johnson* v. *Morrill*, 20 Cal. 2d 446.

The District Court, though, held section 10 of the Lanham Act inapplicable because administrative control of the housing tract was transferred from the Federal Works Administrator to the Department of War, effective September 1, 1942, pursuant to the Act of January 21, 1942, 56 Stat. 11, 12. R. p. 220. The original Lanham Act provided that defense housing projects should "be disposed of as promptly as may be advantageous under the circumstances." Lanham Act, 54 Stat. 1125, 1127. The 1942 amendment, relied upon by the District Court, added an exception to this disposal policy by authorizing the Federal Works Administrator to transfer administrative control of the housing projects to the War or Navy Departments who could then maintain these housing projects as permanent installations. Act of January 21, 1942, 56 Stat. 11, 12. Neither the language of the statute authorizing the transfer of administrative control, nor its legislative history, show a Congressional intent to supersede the restrictions of section 10. House Report No. 1457, 77th Cong., 1st Sess.; Senate Report No. 918, 77th Cong., 1st Sess.; House Report No. 1589, 77th Cong., 2nd Sess.; 87th Cong. Rec. 9276-9281; 9675-9699; 9832-9836; 9997-9999; 10028-10031. The District Court, therefore, erred in finding that the United States acquired exclusive jurisdiction over Tract A at Castle Air Force Base.

D. Appellants on this appeal will also assert that the Oakland Army Terminal, County of Alameda, California, lies within state criminal jurisdiction. On July 5, 1950, Secretary of the Army Frank Pace, Jr., by letter to the California State Lands Commission gave notice that: "The Department of the Army, in behalf of the United States of America, hereby assents to acceptance of federal jurisdiction over the subject land: . . . *upon and subject to each and all of the conditions and reservations prescribed in said Government Code, section 126, ...*" (emphasis added). R 443.[13]

The State Lands Commission on October 5, 1950, adopted a resolution that the acquisition of the land comprising the Oakland Army Terminal "is in the interest of the State." R *98*.

At the time of the resolution of the State Commission, section 126, Government Code (Stats. 1947, Ch. 1532, p. 3163), provided:

> "Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law;*" (Emphasis added).[14]

[13] The text of section 126, Government Code, as amended by Stats. 1947, Ch. 1532, p. 3163, is set forth in Appendix p. 107.

[14] Other reservations of state jurisdiction were the power of taxation, and the civil and political rights of the residents on the enclave, Sec. 126, Gov. C., Appendix p. 108.

Appellants assert that this reference to "other conditions or reservations prescribed by law" incorporates by reference to the provisions of companion section 113, Government Code (Stats. 1947, Ch. 1532, p. 3163), which provided:

> "The State reserves the administration of the criminal laws of the State with respect to any land over which any jurisdiction has been or may be *ceded* or *conveyed* to the United States, during the time the United States is the owner thereof" (emphasis added).

Both sections 113 and 126, Government Code, were amended by the same bill in the 1947 session of the California Legislature (Senate Bill 656, 1947 Legis. Sess.; Stats. 1947, Ch. 1532, p. 3163).[15] On this appeal appellants will contend that in enacting sections 113 and 126, Government Code, the Legislature intended to reserve state criminal jurisdiction over lands coming within the scope of said section 126. No authority is cited by the District Court for its contrary conclusion. This reservation of criminal jurisdiction would bring the milk sales transactions occurring on the Oakland Army Terminal within the penal provisions of the California Milk Stabilization Act, Sec. 4361, 4410,

[15] As originally drafted Senate Bill 656 amended only Section 126, Government Code, i.e., transferring administration from Board of Equalization to State Lands Commission. The Bill was amended on the floor of the state Senate, adding language amending section 113 to "reserve the administration of the criminal law of the state "with respect to any land . . . ceded or conveyed to the United States . . ." California Senate Journal, 1947, Vol. 2, pp. 2166-2167.

Agr. C. Compare *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261.

VIII. District Court Procedural Errors

A. The District Court erred in proceeding to enter final judgments without trial or the taking of evidence. In action No. 39073 final judgment was entered on appellees' motion for summary judgment. R 114, 188. In action No. 39030 final judgment was entered on the trial court's own motion. Appendix p. 29. In both actions 39030 and 39073 the material allegations of the complaints were denied in appellants' answers. 832; 836-A. In particular, appellees' allegations that the United States had acquired exclusive jurisdiction over the particular bases in question[18] and appellees' allegations of monetary loss were denied. R 832; 836-A. It has been held that similar allegations and denials presented triable issues of fact. See *Colorado* v. *Toll*, 268 U.S. 228, 231-232 (1925); *Beal* v. *Missouri Pacific R. Co.*, 312 U.S. 45, 50-51 (1941). It is noted that the statements in appellees' affidavits were denied by appellants on lack of information and belief. R. 432.

Appellants' quarrel with the findings of the District Court. The trial court found that title to the land at the Travis Air Force Base was acquired between December 1942 and March 1943. Appendix p. 41.

[18] For example, the California State Lands Commission by resolution gave state consent to the federal acquisition of land at the Oakland Army Terminal. R. 98. Appellants deny that it was intended that this resolution should constitute a cession of exclusive jurisdiction.

The record shows to the contrary that the land was acquired from September 4, 1942 to June 17, 1958. R 978-990. This error is material since the United States has never given notice of acceptance of jurisdiction over the lands acquired at Travis since January 3, 1944, and such lands must therefore be within state sovereignty. R 320, 448 *Adams* v. *United States*, 319 U.S. 312, 313 (1943).

Similarly, the District Court found that title to the land at the Oakland Army Terminal was acquired in 1950. Appendix, p. 35. The record is contrary, and shows that the base is partially leased, and that the remaining portion was acquired in 1941, 1942 and 1943. R 94-99; 818. These errors are material since the United States has never attempted to acquire jurisdiction over leased land. R 320, 448. See *Penn. Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 267. The time of acquisition is material since different state statutes were in effect in the earlier period 1941-1943.

The findings recite that all deliveries of milk occur on tract A, Castle Air Force Base (acquired July 17, 1943, R 424), while the record shows that milk is also received on parcel 12 on said base (acquired March 17, 1947). R 427, 813. This error is material since no notice of acceptance of jurisdiction has been given for parcel 12, and it therefore lies within state sovereignty. Other errors are present in the findings and their discussion is reserved in appellants' brief on the merits. It is to be noted that appellants'

efforts to obtain discovery with which to oppose the appellees' motion for summary judgment was denied by order entered July 1, 1960. R 629, docket entry in #39030, p. ii; docket entry in #39073, p. ii. Both the facts and the law in this case are complicated and disputed. This case should be decided only after a trial. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-257 (1948); *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434 (1947).

B. In action No. 39030 the District Court entered permanent injunction on its own motion, since appellees had filed only the one motion for preliminary injunction. R 12. The issue before the trial court was whether enforcement of the state act would reflect irreparable injury to appellee pending final hearing, not whether the statute was unconstitutional. *Mayo* v. *Canning Co.*, 309 U.S. 310, 316 (1940). This error is prejudicial if the District Court erred in deciding the companion case No. 39073 on motion for summary judgment.

C. The District Court, by injunction, restrained the defendant state officers from proceeding in pending state court proceedings in which state interpretation of state statutes could be obtained. In one of the state suits, *Warne* v. *Milk Producers Association*, Merced County Superior Court No. 28301, on appeal District Court of Appeal, Third Appellate District, Nos. 9948 and 10185, the state court ruled that Castle Air Force Base lay within state sovereignty. R 831-831A. The United States appeared as an amicus curiae R 831 A.

No question is raised as to the jurisdiction of the District Court; appellants' quarrel is with the manner of its exercise. The acts appellants complained of consisted of the orderly filing of actions in the state courts. In these state court actions the participation of the United States was welcomed. Under these circumstances the District Court erred in enjoining the continuance of the then pending state actions to the irreparable injury of the dairy farmers who supplied milk to contractors with the United States. See Ex parte Young, 209 U.S. 123, 162 (1908); "but the Federal Court cannot, of course, interfere in a case where the proceedings were already pending in a state court." Compare *Wilson* v. *Schnettler*, 365 U.S. 381, 384 (1961).

D. As noted hereinabove, the California milk stabilization act was construed by the District Court as placing a prohibition on the federal government. This construction is contrary to that of the highest state court. *Pacific Coast Dairy* v. *Dept. of Agriculture*, 19 Cal. 2d 818, 830, rev'd on another ground, 318 U.S. 285. Further, section 34, 1872 Political Code, as amended, and its relation to Statutes of 1897, Chapter 56, page 51, and section 126, Government Code, have never been construed by the California courts. Their construction by the state courts in the light of appellee's claim of constitutional immunity, and claim of exclusive jurisdiction, may moot or change the posture in this Court of the constitutional issues posed by appellee's complaint. The District Court therefore erred

in not abstaining from exercising jurisdiction pending clarifying construction of the state enactments in the state courts *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 228-230 (1957). Compare *Nolan* v. *Transocean Air Lines*, 365 U.S. 293 (1961).

CONCLUSION

It is submitted that the questions presented by this appeal are substantial, and are important to state-federal relations, and call for resolution by this Court.

Respectfully submitted,

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APPENDIX A

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff*, vs. WILLIAM E. WARNE, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants*.	Nos. 39030 39073 Memorandum Opinion

Before: JERTBERG, Circuit Judge, and HARRIS and SWEIGERT, District Judges

SWEIGERT, District Judge

I. BACKGROUND OF THE CASE

The above two actions have been brought by the United States to determine the applicability of the California Milk Stabilization Law (Cal. Agricultural Code, Div. 6, Ch. 17, Secs. 4200 to 4420) to purchases made by the United States, through U. S. Army and Air Force procurement officers, of milk and milk products from local producers and distributors for on-base mess hall consumption and on-base commissary sales at three federal military installations located within the territorial limits of California.

Civil Action No. 39030, involving the Oakland Army Terminal, is before this Court on plaintiff's motion for a preliminary injunction. Civil Action No. 39073, involving Travis Air Force Base (Count I), and Castle Air Force Base (Count II), is before the Court on plaintiff's motion for summary judgment. Because these actions test the constitutionality of the State milk law as applied to the federal government, the

present three judge court was assembled, pursuant to 28 U.S.C. Sections 2282 and 2284.

Two additional actions, Civil Action No. 39052, involving Camp Pendleton, and Civil Action No. 39059, involving Mather Air Force Base, are on file awaiting determination of these actions.

II. CALIFORNIA MILK STABILIZATION ACT

Briefly, the California Milk Stabilization Act was passed in 1935 to regulate the marketing and distribution of fluid milk and fluid cream. Cal. Agricultural Code Section 4201 declares that such products are necessary articles of food, that the production and maintenance of an adequate supply of healthful milk is vital to the public health and welfare, and that the policy of the State is to promote, foster and encourage the intelligent production and orderly marketing of milk, and to eliminate unfair and destructive trade practices.

To achieve these ends, marketing areas throughout the State were established (Section 4204), to be administered by the Director of Agriculture (Section 4270), whose duty it is to establish minimum milk prices (Sections 4246, 4247, 4281, 4352, 4353), and to license milk distributors within each marketing area (Sections 4244, 4375).

Under provisions of the Act, the Director is also empowered to revoke and suspend licenses for violation of any stabilization and marketing plan (Section 4415) to bring actions to enjoin such violations (Section 4256), and to prosecute actions to recover civil penalties of $500 for each violation (Section 4410)

The California Attorney General is also empowered to enforce the Act, under Article V, Section 21 of the California Constitution, Section 12511 of the Califor-

nia Government Code, and Section 4410, supra, to bring prosecutions for criminal violations of the milk code.

III. PRELIMINARY MATTERS

The defendants, the California Director of Agriculture and the California Attorney General, have filed actions in various State courts, seeking injunctive relief and civil penalties against milk suppliers and distributors who have entered into procurement contract with federal officials at the several military bases, calling for the sale of milk at negotiated prices less than those established under the State Act. (Exhibits 8-11). Defendants have also instituted declaratory judgment actions in this Court against federal procurement officers at Travis Air Force Base, Civil Action No. 39080, seeking a determination of their right to enforce the State law as to milk sales consummated at that base.

The United States contends that these State attempts to enforce the milk act have interfered with the purchase of milk and milk products by the United States at its military installations, over which it claims exclusive legislative jurisdiction, and are in conflict with federal competitive bidding policy and procedures, expressed in Armed Services Procurement Regulations, para. 1-301, 1-302.2, 3-101 and 3.108.1, and Army Procurement Procedure, para. 3-101.

The United States alleges that, being unable to obtain milk and milk products at less than the State minimum price, it has incurred additional operating costs of $15,000 per month on milk purchases at Travis Air Force Base (Rainey's Affidavit of March 8, 1960), $112,457 per year at Castle Air Force Base

(Mann's Affidavit, Attachment H), and $10,000 per month at Oakland Army Terminal. (Complaint, para. 18).

It is the position of the United States that the State milk code may not constitutionally be applied to lands over which the United States has exclusive legislative jurisdiction; further that its enforcement violates the right of the plaintiff to be free from State interference in the exercise of a federal function, under the Supremacy Clause, Art. VI, Clause 2 of the United States Constitution. On these facts, we believe that a justiciable controversy exists. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960), *California Public Utilities Commission* v. *United States*, 355 U.S. 534 (1958).

Preliminarily, the defendants urge that this Court should abstain from consideration of these cases on the merits, because of the existence of State questions which, if determined by the California State Courts, would render assistance to this Court in the formulation of its decision.

Although a determination of these cases upon the merits depends in part upon the legal effect of certain proceedings taken pursuant to State consent-to-purchase statutes and State cession statutes, the question whether the United States acquired exclusive legislative jurisdiction over the lands comprising the various military reservations under discussion is a federal question arising under Title 28 U.S.C. Sections 1331, 1345. *Silas Mason Co.* v. *Tax Commission*, 302 U.S. 186, 197 (1937).

In *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), it was held that a federal district court may not abstain from exercising its jurisdic-

tion where there is no hazard of unnecessarily deciding a federal constitutional question, or of unsettling some delicate balance in the area of federal-state relationships, or of resolving difficult and uncertain issues of State law.

Such factors being absent, we are of the opinion that we should proceed to a consideration of the issues.

IV. THE ISSUES

In *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261 (1943), the Supreme Court held that the Pennsylvania Milk Control Commission should not be restrained from enforcing a similar milk act or from refusing to license a milk distributor who had sold milk to the United States at a military installation at prices less than the minimum fixed by the Pennsylvania act. In that case, however, the Court noted that the military installation was situated, not on land over which the United States had exclusive jurisdiction, but on land over which the State of Pennsylvania retained its jurisdiction.

In *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285 (1943), decided the same day, the Court reached a different conclusion, holding that the California Department of Agriculture could not enforce the California milk code by revoking the license of a milk distributor for selling milk to the United States at a military reservation, Moffet Field, over which the United States exercised exclusive jurisdiction, at prices less than the minimum set by State law.

Recognizing that the results reached in the two cases might seem contradictory, the court noted, 318 U.S. at p. 295, that: "in preserving the balance

between national and state power, seemingly inconsequential differences often require diverse results".

In the instant cases, defendants seek to avoid application of the *Pacific Coast Dairy* case to the three military installations here involved upon the ground that these installations are not in fact within the exclusive jurisdiction of the United States, and that, therefore, these cases are to be determined, not under *Pacific Coast Dairy*, but under the rule of *Penn Dairies*.

Defendants contend further, that even if these installations are within the exclusive jurisdiction of the United States, the penal provisions of the California Milk Act were assimilated as law within these federal enclaves under the so-called Assimilative Crimes Act, as amended in 1948, Title 18 U.S.C. Section 13.

Plaintiff contends: First, that the three installations here involved are in fact within the exclusive jurisdiction of the United States.

Secondly, that even if they are not, these cases should not be determined under the rule of the *Penn Dairies* case, supra, because the California Milk Act is in conflict with federal procurement regulations and policy within the rule of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958), to which we shall refer in due course; and, therefore, that so far as the United States is concerned, the California Act violates the Supremacy Clause of the United States Constitution, Art. VI, Clause 2.

Further, and for this reason, plaintiff contends that the penal provisions of the California Act could not have been assimilated in these enclaves under the Assimilative Crimes Act.

V. THE ISSUE OF EXCLUSIVE JURISDICTION

A. Oakland Army Terminal

The United States alleges, and the record shows without contradiction, that the lands comprising the Oakland Army Terminal were acquired by the United States in 1950 through condemnation proceedings for the purposes set forth in Art. I, Sec. 8, Cl. 17 of the Constitution. (Plaintiff's Memorandum, filed March 30, 1960; and Exhibit 15)

That Constitutional provision reads in pertinent part as follows:

> "The Congress shall have power . . . to exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State . . . for the Erection of Forts . . . and other needful Buildings."

At the time of the acquisition of Oakland Army Terminal in 1950, California Government Code, Sec. 126 provided: "Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law."

Then follow the various express conditions and reservations of the statute: "(a) The acquisition must be for the erection of forts . . . and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States . . .

"(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b) and (c) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the Commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State, and recorded in the office of the County Recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation . . . and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given . . . ."

The records of the California State Lands Commission, on file herein as attachments to Exhibit 1, show that by letter of acceptance from the Secretary of the Army to the California State Lands Commission, dated July 5, 1950, the Department of the Army accepted federal jurisdiction over the subject land in behalf of the United States.

Such acceptance of jurisdiction was made pursuant to the requirements of R. S. §355, 40 U.S.C.A. Section 255, which provides " : . . until the United States has accepted jurisdiction over lands . . . it shall be conclusively presumed that no such jurisdiction has been accepted."

By resolution dated October 5, 1950, the State Lands Commission found "that the conditions prescribed in subdivisions (a), (b) and (c) of section 126 of the Government Code of the State of California had been found to have occurred and to exist, and that such acquisition is in the interests of the State" (Resolution, California State Lands Commission, October 5, 1950, Exhibit 1.)

Certified copies of the Order and Resolution of the State Lands Commission were filed in the office of the Secretary of State and recorded in the office of the County Recorder of Alameda County, where all the land is situated. By letter of October 31, 1950, the State Lands Commission notified the Secretary of the Army that full compliance had been made with Government Code Section 126. (Exhibit 1).

The State of California contends that California Government Code Section 126 operates only as a consent to the acquisition of land by the United States, but not as a transfer of jurisdiction to the United States over the lands.

We are of the opinion, however, that although Sec. 126 contains no express words to that effect, it manifests clearly the intent of the California legislature that it operates to transfer legislative jurisdiction over such lands.

The section makes express reference to land acquisitions for the purposes set forth in the U.S. Constitution, Art. I, Sec. 8, Cl. 17, a provision which deals specifically with the acquisition by the United States of "exclusive legislative jurisdiction", over lands purchased by the United States for such purposes with the consent of the legislature of the State.

Further, Section 126 expressly requires an assent in writing by the United States to "acceptance of jur-

isdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed."

Further, Sec. 126 makes express "reservations" of State jurisdiction over the land for specific, limited purposes—service of civil and criminal process and the power of taxation. These express reservations of certain limited areas of jurisdiction are consistent only with an intent that jurisdiction would otherwise pass to the United States.

Further, as we shall mention in our discussion of Travis Air Force Base, the Attorney General of California has ruled that the precursor section of the above Government Code sec. 126 (Cal. Pol. Code Sec. 34), which is substantially similar to Government Code Sec. 126, is operative, not only as a mere consent to purchases, but to vest jurisdiction in the United States.

The State of California next contends that, assuming Section 126 is held to operate to transfer legislative jurisdiction, the section's reference to "other conditions or reservations prescribed by law" is in effect a reference to Government Code Section 113, as amended by Stats. 1947, ch. 1532, p. 3164, repealed by Stats. 1955, ch. 1447, p. 2636, which at the time of the acquisition of the lands comprising Oakland Army Terminal provided:

"The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

This provision, the State of California argues, reserved the penal provisions of the California Milk

Stabilization Law, e.g., Sections 4361, 4410, from any transfer of jurisdiction.

We are of the opinion, however, that Section 113 is applicable only to lands "ceded" to the United States, as distinguished from lands acquired through purchase or condemnation by the United States with the State's consent—as in the case of these Oakland Army Terminal lands.

The distinction between these two methods of acquisition of jurisdiction by the United States over lands becomes clear in the light of the history of the judicial interpretation of Art. I, Sec. 8, Cl. 17 of the Constitution.

At an early date it was suggested that the only means by which the federal government could acquire jurisdiction from the States over lands was the so-called purchase-by-consent method provided by Art. I, Sec. 8, Cl. 17. See, *United States* v. *Railroad Bridge Company*, C.C.N.D. Ill. 1855, 27 Fed. Cas. pp. 686, 693, No. 16, 114.

However, in *Fort Leavenworth* v. *Lowe*, 114 U.S. 525 (1885), the Supreme Court sustained the validity of Kansas legislation "ceding" to the United States legislative jurisdiction over Fort Leavenworth, situated on lands which the United States had no cause to "purchase", within the meaning of Art. I, Sec. 8, Cl. 17 of the Constitution, because the lands had been possessed by the United States before the admission of Kansas into the Union.

The Court thus recognized a new method, i.e., "cession", by which the United States might acquire jurisdiction over lands where no "purchase" for constitutionally specified purposes was involved, e.g., when the lands had been part of the public domain

and had been reserved from sale, *Fort Leavenworth* v. *Lowe*, supra, or when, although a purchase was involved, the purpose was not one enumerated by Art. I, Sec. 8, Cl. 17 of the Constitution, *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938).

Following the *Fort Leavenworth* decision, a number of States adopted so-called "cession statutes" to supplement their consent-to-purchase statutes. One of these States was California, which in 1891 adopted its cession statutes, Stats. 1891, ch. 181, p. 262, codified into Government Code Section 113, effective August 4, 1943, referred to above; also, Stats. 1897, ch. 56, p. 51, codified into Government Code Section 114, effective August 4, 1943, until repealed by Stats. 1947, ch. 1532, p. 3164, to which we will later refer in our discussion of Travis and Castle Air Force Bases.

The California Attorney General has himself recognized that acquisition by the federal government of exclusive jurisdiction over land by the consent-to-purchase method, provided in Art. I, Sec. 8, Cl. 17, is distinct from the acquisition of exclusive jurisdiction pursuant to these State "cession" statutes. (See, Report of the California Attorney General, *Jurisdiction Over Federal Enclaves in California*, 1958, pp. 3, 42, 72-73; also, 23 Op. Cal. Attorney General 14 (1954).

We are of the opinion, therefore, that Government Code Sec. 113 did not reserve administration of the criminal provisions of the California Milk Stabilization Act over the lands comprising Oakland Army Terminal.

Defendants next contend that, even though exclusive jurisdiction was effectually tendered to the United States, only "partial" jurisdiction was in fact accepted by the United States in the letter of accept-

ance sent by the Secretary of the Army to the California State Lands Commission, dated July 5, 1950, referred to above, wherein it was stated: "The Department of the Army, in behalf of the United States of America, hereby assents to the acceptance of federal jurisdiction over the subject land."

Defendants make the point that the use of the phrase "federal jurisdiction" by the Secretary of the Army and his omission of the phrase "exclusive jurisdiction," a phrase which appeared in previous letters of this kind from the Secretary of War, signifies an intent to accept only "partial" jurisdiction.

We do not agree with this contention. The letter of acceptance from the Secretary of the Army, forwarded pursuant to R.S. §355, 40 U.S.C.A. Section 255, referred to above, accepts federal jurisdiction without qualification. This letter effectively accepted the exclusive jurisdiction contemplated by Art. I, Sec. 8, Cl. 17 of the Constitution.

B. Travis Air Force Base

The United States alleges and the record shows without contradiction that the lands on which Travis Air Force Base is located were acquired by the United States between December, 1942, and March, 1943, through various purchases and condemnations, for military purposes under the provisions of Art. I, Sec. 8, Cl. 17 of the Constitution. (Attachments A and B to LaBuda's Affidavit; and deeds and condemnation awards attached to Exhibits 1, 2, and 3).

California Political Code Section 34, codified into Government Code Section 111, Stats. 1943, ch. 134, p. 1009, repealed by Stats. 1947, ch. 1532, p. 3163, at the time of these acquisitions provided: "The Legislature consents to the purchase or condemnation by the

United States of any tract of land within this State for the purpose of erecting forts . . . and other needful buildings . . . upon the express condition that all civil and criminal process may be served thereon.

On April 16, 1943, the Secretary of War communicated with the Governor of California, pursuant to R. S. §355, 40 U.S.C.A. Section 255, accepting "exclusive jurisdiction over all lands acquired by (the United States) for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." (Exhibit 4).

The State of California contends that California Political Code Section 34 operates only as a consent to the acquisition of land by the United States, but not as a transfer of jurisdiction to the United States over lands so acquired.

The California Attorney General has, himself, held that, under Art. I, Sec. 8, Cl. 17 of the United States Constitution, and under California Political Code Section 34, "jurisdiction vests in the federal government upon compliance by the latter with its own statutes. See, also, *Report of the California Attorney General, Jurisdiction over Federal Enclaves in California*, 3, 72-3 (1958). We concur in this view.

The State of California next contends that the United States did not effectively accept any tendered transfer of jurisdiction by the State, because it failed to comply with Cal. Stats. 1897, ch. 56, p. 51, codified into Government Code Section 114, which at the time of the acquisition of Travis Air Force Base provided:

"The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied or reserved by the Government of the United States for military

purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes, provided that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated . . ." The act further reserves the right to serve civil and criminal process.

Specifically, the State of California contends that no such map or description by metes and bounds was ever filed.

As we have already noted in our discussion of Oakland Army Air Base, Stats. 1897, ch. 56, and its related Stats. 1891, ch. 181, p. 262, are "cession" statutes, and are inapplicable to transfers of jurisdiction to the United States pursuant to the consent-to-purchase method provided in Art. I, Sec. 8, Cl. 17 of the Constitution.

In the report of the California Attorney General previously cited, it is specifically stated (p. 72-3) that the map or plat filing requirements of Stats. 1897, ch. 56 (Government Code sec. 114) are not applicable to such transfers.

C. Castle Air Force Base

The complaint alleges and the record shows without contradiction that the portion of Castle Air Force Base on which sales and deliveries of milk and milk products take place is a so-called Tract A, some eighteen acres of land, more or less, which the United States claims to have acquired for military purposes, within the meaning of Art. I, Sec. 8, Cl. 17 of the Constitution, under a deed, dated April 6, 1943, from one Sheldon M. Phillips to the United States. (Mann's Affidavit, p. 5; Attachment A to Dane's Affidavit).

At the time of the acquisition, the California consent-to-purchase statute was Political Code Section 34, referred to in our discussion of Travis Air Force Base, supra.

On April 16, 1943, ten days after the date of the deed under which the United States claims to have acquired Tract A for military purposes, the Secretary of War communicated with the Governor of California, pursuant to R. S. §355, 40 U.S.C.A. Section 255, accepting "exclusive jurisdiction over all lands acquired by (the United States) for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." (Exhibit 4).

The contentions of the defendants as to Castle Air Force Base are for the most part similar to those raised in connection with Travis Air Force Base, which we have already discussed.

In one respect, however, Castle Air Force Base presents a special problem. The State of California contends that the United States did not acquire title to Tract A, Castle Air Force Base, for military purposes on April 6, 1943, nor even by April 16, 1943, the date of the Secretary of War's letter to the Governor of California, accepting exclusive jurisdiction of all land "title to which has heretofore vested in the United States". Therefore, argues the State, Tract A was not included within the terms of that letter, and the United States has not in fact accepted exclusive jurisdiction over Tract A.

The record shows that Tract A was originally acquired by the National Housing Agency for the construction of war housing (Attachments B and C to Dame's Affidavit), under the provisions of the Lan-

ham Act, 54 Stat. 1125, 42 U.S.C.A. Section 1521 et seq., Section 10 of which precludes the United States from accepting exclusive jurisdiction over land so acquired.

Thereafter by letter, dated October 21, 1942, effective September 1, 1942, Tract A was transferred from the National Housing Agency to the War Department. (Attachment D to Dame's Affidavit). On April 6, 1943, pursuant to a lawful condemnation action, a deed from one Sheldon M. Phillips to the United States was delivered to the War Department. (Attachment A to Dame's Affidavit) and the certificate of title was declared satisfactory by the United States Attorney General by letter dated September 29, 1943, addressed to the Secretary of War. (Attachment E to Dame's Affidavit).

The State of California contends, however, that title to Tract A did not pass to the United States under this deed of April 6, 1943, for the reason that the grantor, Sheldon M. Phillips, did not himself receive title to Tract A until July 17, 1943, when he received a deed from the Federal Farm Mortgage Corporation. (Affidavit of Paul Andrew; Attachment A thereto). Therefore, argues the State, Phillips' prior deed of April 6, 1943 did not pass title to the United States until at least July 17, 1943, under the rule of after-acquired title, set forth in California Civil Code Section 1106.

Defendants contend that there is thus presented a material issue of fact relative to the time of the transfer of title to the United States, and that for this reason the Court cannot grant summary judgment in the case of Castle Air Force Base.

Assuming, without deciding, that the Phillips deed of April 6, 1943 did not effectively convey title in

Tract A to the United States, and that, therefore, Tract A was not within the terms of the Secretary of War's letter of acceptance of exclusive jurisdiction, we note that there is contained in the record another and subsequent letter, dated January 3rd of the following year, 1944, which accepts exclusive jurisdiction in terms similar to the prior letter of April 16, 1943. (Part of Exhibit 12).

It is clear, even upon the State's theory, that the United States had acquired title to Tract A by July 17, 1943 (Andrew Affidavit, supra). In that case, the letter of the Secretary of War, dated January 3, 1944, accepting exclusive jurisdiction over all lands title to which had previously vested in the United States, was applicable by its terms to Tract A and effectively accepted jurisdiction over it, even if the previous acceptance letter of April 16, 1943 did not. (Exhibit 12, supra).

The State of California makes the further point that Section 10 of the Lanham Act, under which Tract A was originally acquired, provides that the United States shall not accept exclusive jurisdiction over lands so acquired.

We are of the opinion, however, that after the transfer of Tract A from the National Housing Administrator to the War Department, pursuant to 42 U.S.C.A. Section 1524, for military purposes, statutory provisions of the Lanham Act, including Section 10, became inapplicable to the land. The War Department would not be subject to statutory provisions pertinent only to lands held by the National Housing Agency for Lanham Act purposes. Upon its acquisition of Tract A for its own military purposes the War Department held it subject only to statutes pertinent to its own powers and purposes.

In the possession of the War Department. Tract A came within the provisions of Article 1, Section 8, Clause 17 of the Constitution and, with the consent of the State of California provided in Political Code Section 34, the United States, through the War Department, could accept exclusive jurisdiction over it. There is, therefore, no material issue of fact involved in our conclusion that Castle Air Force Base is within the exclusive jurisdiction of the United States.

VI. THE ISSUE OF THE SUPREMACY CLAUSE

We turn now to the contention of the plaintiff that, even if these installations are not within the exclusive jurisdiction of the United States, there is a conflict between the California Milk Stabilization Act and federal procurement regulations and policy, and that, therefore, the milk act, so far as the United States is concerned, violates the Supremacy Clause of the Constitution, Art. VI, Cl. 2.

In considering whether the California Milk Act is inconsistent with federal procurement regulations and policy, we must bear in mind that the Supreme Court in the *Penn Dairies* decision, referred to at the outset of this opinion, held, *inter alia*, that the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, Purdon's Pa. Stat. Ann., Title 31 Section 700j—101, et seq., which is similar to the California Act, was not in conflict with any federal procurement statute, regulation or policy.

The Court there took the view that federal legislation did not disclose a purpose to "immunize government contractors from local price-fixing regulations which would otherwise be applicable." (318 U.S. at p.

278) even though such regulations imposed increased economic burdens on the federal government.

The Court particularly noted, however, that the Pennsylvania Milk Control Act was not directed at the federal government or its officers, citing the Pennsylvania State court below, 148 Pa. Super. 261, 270-271, 24 A 2d 717 (1942).

In a more recent expression of the Supreme Court upon the subject of conflict between State regulation and federal procurement policy, *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958), which notes, but distinguishes the above *Penn Dairies* case, it has been held that California Public Utilities Code Section 530 is in clear conflict with federal procurement regulations sanctioning the policy of negotiated rates by federal procurement officers in shipments of federal property.

Section 530 provided in part that the California Public Utilities Commission "may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable . . ."

In considering the question "whether the United States can be subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it," (355 U.S. at p. 379) the Court discussed federal procurement policy, stating at p. 540 of 355 U.S.: "Congress has provided a comprehensive policy governing procurement." Then, at p. 542 at 355 U.S.: "It seems clear that these regulations—which have the force of law, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Standard Oil Co. v. Johnson*, 316 U.S. 481—sanction the policy of negotiating rates for ship-

ment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken."

Federal procurement policy, dealing with federal contracts and purchases, whether in relation to the procurement of transportation or milk or other property or services, is set forth in the provisions of the Armed Services Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. Section 2301, et seq. described in the House of Representatives report as "a comprehensive revision and restatement of the laws governing the procurement of supplies and services." (House Rept. 109, 80th. Cong., 1st. Sess., p. 6).

That competitive bidding is the cornerstone of this policy is exemplified by 10 U.S.C. Section 2304(a), which provides that purchases of property or services, or contracts therefor, shall be made by competitive bidding through formal advertising.

That section allows heads of agencies in certain special situations to negotiate purchases or contracts, rather than observe the basic competitive bidding policy, as, for example, purchases of perishable or non-perishable subsistence supplies, such as milk. Section 2304(a)(9).

Notwithstanding this last mentioned statutory exception, fluid milk is purchased at Travis and Castle Air Force Bases by the Air Force through competitive, advertised contracts, pursuant to Air Force Procurement Instructions 2-102(c)(1).

Another exception, which should be noted, is Section 2304(a)(10), which authorizes negotiation where the purchase or contract is for property or services for which it is "impracticable to obtain competition." Defendants have sought to rely upon this exception.

contending that it is "impracticable to obtain competition" where the State has established minimum milk prices. However, 32 C.F.R. Section 3.210-3 provides that this exception is inapplicable where negotiation is authorized for the purchase of perishable or non-perishable subsistence supplies, such as milk.

In any event, the procurement regulations are clear as to the paramount objective of defense procurement policy: "*Such procurement shall be made on a competitive basis whether by formal advertising or by negotiation, to the maximum practicable extent.*" 32 C.F.R. Section 1.301. (emphasis supplied).

We note further that milk and milk products are included within a general procurement scheme so comprehensive that it is designed, not only for economy and efficiency, but also for health and quality control. For example, 32 C.F.R. Section 608.1, specifically requires the award of contracts for procurement of milk or milk products to be limited to dairies which have passed defense inspections or which have been certified by federal authorities as approved sources of supply. See, also 32 C.F.R. Sections 156.1, 156.2, regarding inspection generally, and 32 C.F.R. Section 608.3, regarding the inspection of milk plants and dairy farms.

It is evident, therefore, as stated in the *Public Utilities* case, that Congress has provided a comprehensive policy governing procurement. This is just as true in the case of milk purchases as it is in the case of transportation-rate contracts.

In the *Public Utilities* case the Court noted that California Public Utilities Code Section 2112 provided penalties applicable, not only to the carrier, but to shippers as well, and that the prohibition of the statute was so broad as to deny the United States the right

to ship at reduced rates without State Commission approval.

The Supreme Court in the *Public Utilities* case, did not point to any provision of the Public Utilities Code, or any other California law or decision, which would expressly or impliedly indicate a legislative intent to aim the penal provisions of the Public Utilities Code directly at the federal government and its officers, if they should be shippers in violation of the code. The Court nevertheless, took the view that the Code was so directed, sighting the District Court opinion (355 U.S. at p. 538) ". . . 'If a United States officer were to negotiate with a carrier for 'reduced rates' without permitting the defendant to determine whether it 'considered' the conditions of the contract 'just and reasonable,' he could be thrown into the county jail.' 141 F. Supp. at [168] at p. 186."

The Court distinguished the *Penn Dairies* decision for the stated reason that there, the Court (318 U.S. at p. 270) had concluded that the State regulation "imposes no prohibition on the national government or its officers." In the *Public Utilities* case, the Court continued, ". . . the State places a prohibition on the Federal Government." 355 U.S., at p. 544.

The United States contends that, even if the *Penn Dairies* decision has not been overruled in effect by the *Public Utilities* case, supra, the *Penn Dairies* decision is inapplicable here for the same reason on which it was distinguished in the *Public Utilities* case, i.e., that the California Milk Stabilization Act, unlike the Pennsylvania Milk Control Act, does impose a prohibition on the federal government and its officers.

In our consideration of the merit of this contention we note certain provisions of the California Milk Act which are quite analogous to the provisions of the Public Utilities Code considered in the *Public Utilities* case.

Under Section 4361 of the California Milk Law, the duty to observe established minimum milk prices and penalties for failure to do so, are imposed, not only upon milk producers and distributors with respect to their sales of milk, but also upon all retail stores, restaurants, confectioneries, or *other places for consumption on or off the premises*, (emphasis supplied) which "purchase" milk from distributors, or which sell to any consumer.

Section 4361 contains further broad provisions designed to make such "purchases" of milk unlawful regardless of the method or device utilized, and regardless of whether they are effected directly or through agents, employees, or subsidiaries.

Section 4280(f) makes it unlawful to handle milk within the marketing areas of the State which is to be sold at less than established minimum prices "at any place, whether part of the marketing area or not."

Section 4410 makes the violation of any provision of the act, or of any stabilization and marketing plan, or of any order of the director, or of any of the unfair practices thereof, a misdemeanor.

The language of these sections is broad enough to include the federal government and its procurement officers, as purchasers of milk from distributors at the various federal military reservations for consumption either on base in the military mess halls.

or off base through retail sales made in military commissaries.

We are unable to discover any substantial difference between the situation considered in the *Public Utilities* case and the situation here presented.

The federal procurement statutes, regulations and policy there were substantially similar to those here involved.

The Public Utilities Code there considered, applied not only to carriers, but to shippers, including shipments by the United States. So, also here, the milk act applies not only to milk producers and distributors, but also to purchasers of milk, including purchases of milk by the United States. Indeed, the basic contention of the State of California in its brief, and the ruling of its Supreme Court in *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 19 Cal. 2d 818, 123 P. 2d 442 (1942), has been and is, that its milk act applies to sales of milk in which the United States is the purchaser.

In the *Public Utilities* case the United States was "subjected to the discretionary authority of a state agency for the terms on which, by grace, it can make arrangements for services to be rendered it." 355 U.S. at page 539. So, also, here the United States is subjected to the discretionary authority of the Director of the California Department of Agriculture (who establishes minimum milk prices for marketing areas) for the terms on which by grace, it can make arrangements for purchases of milk at its various military installations.

In the briefs in the pending cases, the State of California disclaims any intent to enforce the penal provisions of its milk act against the United States

Title 18 U.S.C. Section 7, referred to in the foregoing section, provides, subsection (3), that the term "special maritime or territorial jurisdiction of the United States" includes:

> "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

It has been held that Title 18, U.S.C. Section 13 is not an unconstitutional delegation of power to the State legislatures, even though it in effect makes applicable to a federal enclave subsequently enacted criminal laws of the State within which the enclave is located. *United States* v. *Sharpnack*, 355 U.S. 286 (1958).

The statute constitutes an adoption by Congress for federal enclaves of State criminal law, when federal criminal law has not defined a certain offense or provided for its punishment. *People of Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937). The State law, assimilated under this section, becomes in effect federal law, *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383 (1944).

In *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 1943, 318 U.S. 285, at page 294, the possibility of the assimilation of local law was noted by the Supreme Court, with this statement: "When the federal government acquired the tract (Moffet Field), local law not inconsistent with federal policy remained in force until altered by national legislation," citing *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940).

or its procurement officers. A similar disclaimer proved of no avail in the *Public Utilities* case. (See reference to record (355 U.S. at p. 551).

We conclude, therefore, that even if the *Penn Dairies* case has not been in effect overruled by the *Public Utilities* case, it is inapplicable here because the California Milk Stabilization Act "places a prohibition on the Federal Government" within the meaning of the *Public Utilities* case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2.

VII. THE ISSUE OF ASSIMILATION

Defendants contend that, even if the State be deemed to have transferred exclusive jurisdiction over the three bases here involved to the federal government, the existing criminal laws of California remained operative therein or became operative thereto by virtue of the provisions of Title 18 U.S.C. Section 13, the so-called Assimilative Crimes Act, as amended in 1948, which provides:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The Court further noted, however, that Moffet Field, there involved, had been acquired by the United States in 1931, long before the enactment of the milk stabilization law in 1935, and concluded that no assimilation had occurred in the case of Moffet Field.

Defendants point out that Travis and Castle Air Force Bases, acquired by the United States in 1943, and Oakland Army Terminal, acquired in 1950, were all acquired subsequent to the enactment of the California Milk Stabilization Act of 1935. They argue that by operation of the Assimilative Crimes Act, enacted in its present form in 1948, the penal provisions of the milk act, notably Sections 4361 and 4410, were adopted as federal law on these enclaves.

The Courts have held, however, that the Assimilative Crimes Act does not operate to adopt any State penal statutes which are in conflict with federal policy, as expressed by acts of Congress or by valid administrative regulations having the force of law. *Air Terminal Services Inc.* v. *Rentzel* D.C.E.D. Va. 1949, 81 F. Supp. 611; *Nash* v. *Air Terminal Services Inc.*, D.C.E.D. Va. 1949, 85 F. Supp. 545; *Johnson* v. *Yellow Cab Co.*, supra.

If, therefore, we are correct in our ruling that the California milk act is in conflict with federal procurement regulations and policy within the meaning of the *Public Utilities* case, the penal provisions of the act were not assimilated into the installations here involved.

Even if we assume that there is no conflict between the California milk act and federal procurement policy and further, that its penal provisions could have been assimilated in these installations notwithstanding ex-

clusive federal jurisdiction over them, any such assimilated provisions would have become federal, not state law, and as such, their enforcement would be the prerogative of the United States Attorney General and the various United States Attorneys.

The State of California, conceding that such would be the case, takes the position that, although violations of assimilated provisions of the milk laws within federal enclaves would be subject to prosecution only by federal authorities in the federal courts, violations of the milk act would also be subject to prosecution by State authorities in State Courts when such violations involved conduct of distributors occurring on state territory and constituting a violation of state law. *Commonwealth* v. *Rohrer,* 1937 37 Pa. Dist. & Co. 410.

In this respect, we note that Section 4280(f) of the milk act, already referred to, makes it unlawful to handle milk within the marketing areas of the State which is to be sold at less than established minimum prices at any place, whether part of the marketing area or not.

We understand the position of the defendants to be that, assuming assimilation of the penal provisions of the milk act in exclusive jurisdiction enclaves, such circumstance would be an equitable factor for this Court to consider before granting injunctive relief to the federal government, which in effect would preclude the State from enforcing its milk law against distributors selling to the federal government even though their conduct may occur on State territory and constitute unlawful conduct under State law.

Such a contention would, in any event, be pertinent to the pending cases only indirectly and collaterally. Absent a prosecution by the federal government under the provisions of the Assimilative Crimes Act, this

Court would abstain from a ruling upon the question whether the milk act, if not in conflict with federal regulation and policy, would have been assimilated within these enclaves.

In *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, Oklahoma State enforcement officials, enjoined on petition of a common carrier from attempting to enforce State liquor laws with respect to purchases of liquor at Fort Sill military reservation, contended that the State liquor law had been assimilated at the base. The Supreme Court refrained from ruling on this point, saying: (321 U.S. at pp. 292-293)—

> "If the carrier's delivery of these liquors on the Fort Sill Reservation would violate any federal law, federal agencies exist which are charged with responsibilities to institute appropriate proceedings against the carrier in federal tribunals. In such proceedings the parties would be the United States and the carrier, and the issue of violation of federal laws would be directly, and not collaterally, presented. The complicated federal questions involved, concerning various federal statutes as well as Army rules and regulations, could be answered upon an adequate presentation of all facts essential to a right and just determination."

CONCLUSION

For the reasons herein stated, the Court concludes, subject to the preparation by the plaintiff in these cases, as prevailing party, of findings of fact and conclusions of law, decree and writ, and settlement and signing thereof by the Court, pursuant to Rule 21 of this Court:

That, in Civil Action No. 39030, defendants' motion to stay proceedings, to quash the temporary restraining order and to deny the petition for preliminary injunction, be denied; that a decree be entered declaring the aforesaid sections of the California Agricultural Code, insofar as they prohibit or authorize the prohibiting of distributors and producers of milk within the State of California from selling and delivering milk to the United States at the Oakland Army Terminal at rates lower than those established by defendants, as unconstitutional and void; and, that the defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be permanently enjoined from making any effort to prohibit such producers and distributors or the United States and its purchasing agents from negotiating and making arrangements and contracts for the sale and delivery of fluid milk to the United States at the Oakland Army Terminal at rates lower than those established by defendants;

Further, that in Civil Action No. 39073, defendants' motion to stay proceedings, to quash the temporary restraining order and to deny the petition for preliminary injunction, be denied, and that plaintiff's motion for summary judgment be granted, and that a decree be entered declaring the aforesaid sections of the California Agricultural Code, insofar as they prohibit or authorize the prohibiting of distributors and producers of milk within the State of California from selling and delivering milk to the United States at Travis Air Force Base and Castle Air Force Base at rates lower than those established by defendants, as unconstitutional and void; and, that the defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation

with them, be permanently enjoined from making any effort to prohibit such producers, distributors, or the United States and its purchasing agents from negotiating and making arrangements and contracts for the sale and delivery of fluid milk to the United States at Travis Air Force and Castle Air Force Bases at rates lower than those established by defendants.

Dated: November 29th, 1960.

GILBERT H. JERTBERG
United States Circuit Judge

GEORGE B. HARRIS
United States District Judge

WILLIAM T. SWEIGERT
United States District Judge

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff,* vs. WILLIAM E. WARNE, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants.*	No. 39030 and 39073 Order

This Court, in its Memorandum Opinion herein, directed plaintiff, as prevailing party, to prepare findings of fact and conclusions of law, and appropriate decree and writ, subject to the settlement and signing thereof, pursuant to Rule 21 of this Court.

Now, upon the written request of both parties herein, the Court withdraws its direction to prepare findings of fact and conclusions of law, and adopts its Memorandum Opinion herein as sufficient, under Rule 52, Federal Rules of Civil Procedure, to constitute the Court's findings of fact and conclusions of law herein.

Therefore, the language of that Memorandum Opinion, page 33, lines 8-11 thereof, directing the plaintiff as prevailing party, to prepare findings of fact and conclusions of law, is hereby stricken, and

the plaintiff will prepare an appropriate order and decree herein.

Dated: March 27, 1961.

GILBERT N. JERTBERG
United States Circuit Judge

GEORGE B. HARRIS
United States District Judge

WILLIAM T. SWEIGERT
United States District Judge

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff*, v. CHARLES PAUL, Director of Agriculture, State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants*.	Civil No. 39030

ORDER AND INJUNCTION

This cause having come on for hearing on an application by the United States of America for an injunction restraining defendants from enforcing the minimum price provisions of Chapter 17, Div. 6, California Agricultural Code and of regulations issued thereunder, with respect to sales and deliveries of milk and milk products to the United States at Oakland Army Terminal, upon the ground that such enforcement is unconstitutional; and upon defendants' motion to stay proceedings, to quash the temporary restraining order and deny the petition for injunction, and the Court having heretofore, on November 29, 1960 filed its Memorandum Opinion, and by Order filed March 27, 1961 adopted said Memorandum Opinion as sufficient under Rule 52, Federal Rules of Civil Procedure, to constitute the Court's findings of fact and conclusions of law,

NOW, THEREFORE, it is this 17th day of April, 1961, ORDERED:

1. Defendants' motion to stay proceedings is denied;

2. Defendants' motion to quash the temporary restraining order and to deny the petition for injunction is denied;

3. Defendants and each of them and their agents, servants, employees, and attorneys, successors and assigns, and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from enforcing or attempting to enforce against producers or distributors of milk or milk products or against the United States or its purchasing agents, with respect to sales, purchases, or deliveries of milk or milk products at the Oakland Army Terminal, either the state minimum producer price, wholesale price, or retail price regulations promulgated by the Director of Agriculture pursuant to the California Milk Stabilization Act.

(S) GILBERT H. JERTBERG
United States Circuit Judge

GEORGE B. HARRIS
United States District Judge

W. T. SWEIGERT
United States District Judge

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff,* v. CHARLES PAUL, Director of Agriculture, State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants.*	Civil No. 39073

ORDER AND INJUNCTION

This cause having come on for hearing on an application by the United States of America for an injunction restraining defendants from enforcing the minimum price provisions of Chapter 17, Div. 6, California Agricultural Code and of regulations issued thereunder, with respect to sales and deliveries of milk and milk products to the United States at Travis Air Force Base and Castle Air Force Base, upon the ground that such enforcement is unconstitutional, and upon defendants' motion to stay proceedings, and the Court having heretofore on November 29, 1960 filed its its Memorandum Opinion, and by Order filed March 27, 1961 adopted said Memorandum Opinion as sufficient under Rule 52, Federal Rules of Civil Procedure, to constitute the Court's findings of fact and conclusions of law,

NOW, THEREFORE, it is this 17th day of April, 1961,

ORDERED:

1. Defendants' motion to stay proceedings is denied;

2. Defendants' and each of them and their agents, servants, employees, and attorneys, successors and as-

signs, and all persons in active concert of participation with them be and they hereby are permanently enjoined and restrained from enforcing or attempting to enforce against producers or distributors of milk or milk products or against the United States or its purchasing agents, with respect to sales, purchases, or deliveries of milk or milk products at Travis or Castle Air Force Bases, either the state minimum producer price, wholesale price, or retail price regulations promulgated by the Director of Agriculture pursuant to the California Milk Stabilization Act.

(S) GILBERT H. JERTBERG
United States Circuit Judge

GEORGE B. HARRIS
United States District Judge

W. T. SWEIGERT
United States District Judge

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants-Appellants.*	Civil No. 39030 and 39073

ORDER EXTENDING TIME FOR DOCKETING AND FILING RECORD IN THE UNITED STATES SUPREME COURT

Based on the affidavit of JOHN FOURT filed herewith and on application of counsel for defendants-appellants, and good cause appearing:

IT IS HEREBY ORDERED pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, that the time within which the appellants named above may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be, and it is hereby enlarged, to and including July 24, 1961.

Dated:

GEORGE B. HARRIS
United States District Judge

APPENDIX B

The pertinent provisions of the California milk stabilization act, Chapter 17, Division 6, California Agricultural Code, as amended, California Statutes of 1959, are as follows:

4200. The production and distribution of fluid milk and of fluid cream and the dissemination of accurate, scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State.

4201. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly market-

ing of comodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

4202. It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary, and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

4203. The foregoing statements in this article of facts, policy and application of this chapter are hereby declared a matter of legislative determination.

4204. The purposes of this chapter are:

(a) To provide funds for administration and enforcement of this chapter, by assessments to be paid by producers of fluid milk or fluid cream, or both, and from licenses issued to distributors in the manner prescribed herein.

(b) To authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State; provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

(c) To authorize and enable the director to formulate stabilization and marketing plans subject to the limitations herein prescribed with respect to the contents of such stabilization and marketing plans and, declare such plans in effect for any marketing area.

(d) To enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about and maintain a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

4205. It is the intent of the Legislature that the powers conferred in this chapter shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices.

Article 2. Definitions

4210. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

4211. "Board" means any local control board created as authorized in this chapter.

4212. "Fluid milk" means any and all whole or concentrated milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed.

4213. "Fluid cream" means cream as defined in this code, and any combination of cream and milk, or any fluid product of milk or cream sold under any trade name whatsoever, which is not packaged in hermetically sealed containers and which contains more than 11.6 percent milk fat and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4214. "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

4215. "Producer" means any person who produces fluid milk from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold, and whose fluid milk or fluid cream is received or handled by any distributor. "Producer" includes any association of producers.

4216. "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributor" shall not include any of the following: (1) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream. (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream. (3) any person owned or controlled by one or more

retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor.

4217. "Producer-distributor" means any person who is both a producer and a distributor of fluid milk or fluid cream. For the purposes of this chapter a producer-distributor shall be deemed to be a producer in any transaction involving the delivery of fluid milk or fluid cream produced by him to a distributor, and shall be deemed to be a distributor in any transaction involving the delivery of fluid milk or fluid cream to a person who is not a distributor as defined in this article.

4218. "Retail store" means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

4219. "Marketing area" is any area within this State declared to be such in the manner prescribed in this chapter.

4220. "Stabilization and marketing plan" means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things, the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

4221. "Consumer" means any person who purchases fluid milk, fluid cream or dairy products for consumption.

4222. "Person" means any individual, firm, corporation, association or any other business unit.

4223. "Fluid skim milk" means skim milk as defined in this code that is derived from market milk and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4225. Fluid milk may be classified for the purposes of this chapter as provided in this article.

4226. Class 1 comprises any fluid milk, fluid skim milk, or fluid cream that is supplied to consumers as market milk, market skim milk, or market cream or concentrated milk or any combination of market milk, market skim milk, and market cream, or any market milk which is not sterilized and packaged in hermetically sealed containers, or any other dairy product in which the use of market milk or any components or derivatives of market milk is required by or pursuant to the provisions of this code, or any fluid milk, fluid skim milk, or fluid cream which is used in standardizing market milk.

4227. Class 2 comprises any fluid milk, fluid skim milk or fluid cream which is used in the manufacture of any product for which a definition and standard is prescribed in Division 4 of this code, except any such product which is included in Classes 1 and 3.

4228. Class 3 comprises all fluid milk, fluid skim milk, or fluid cream, which is used in the manufacture of butter, cheese other than cottage cheese, dried milk, dried skim milk, nonfat dry milk solids, defatted milk solids, dried buttermilk, or any product for which no definition and standards are prescribed in Division 4 of this code; provided, that whenever the director establishes a temporary definition and standards for an

new milk product pursuant to Section 441 he shall assign such new product to that class under this article which includes the most nearly comparable product or products as determined by the director; and provided further, that any product required by any regulation of the director pursuant to Section 441 to be made from market milk or any components or derivatives of market milk shall be included within Class 1.

4230. In designating and prescribing or providing methods for designating and prescribing minimum prices to be paid by distributors to producers for Classes 2 or 3 fluid milk, fluid skim milk or fluid cream, the director may take into consideration all relevant economic factors, including but not limited to the relative market values of the various products involved and the market price of other milk which may be used for the same purposes set forth in such respective classes. In no event shall any distributor pay producers or any association of producers less than the applicable price established for the usage to which the fluid milk, fluid skim milk or fluid cream purchased from them is applied; and no payment shall be made by distributors to producers or any association of producers of prices lower than those established in the applicable stabilization and marketing plan for Class 3 usage.

Article 4. General Powers of the Director

4240. The director shall enforce the provisions of this chapter and any stabilization and marketing plan initiated pursuant to the provisions of this chapter, and for that purpose may make such rules and regulations as he deems necessary.

4241. The director shall have and may exercise any or all the powers conferred by the Government

Code upon the head of a department of the State with respect to hearings and investigations under this chapter.

4242. The director is hereby declared to be the instrumentality of this State for the purpose of administering and enforcing the provisions of this chapter and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority described in this chapter.

4243. The director may investigate any and all transactions between producers and distributors or among distributors or between distributors and retail stores or between distributors and consumers or between retail stores and consumers, and for that purpose the director or his authorized agents shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the State.

4244. The director may issue licenses to distributors and require the registration of producers.

4245. The director may formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan.

4246. The director may prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors, pursuant to the provisions of this chapter.

4247. In the event that the director establishes under this chapter a stabilization and marketing plan for fluid milk, the director shall prescribe minimum prices to be paid by distributors for fluid cream, fluid skim milk, or milk fat, or fluid skim milk components of such fluid milk, under such a stabilization and marketing plan, pursuant to the provisions of this chapter.

4248. The director may amend or terminate any stabilization and marketing plan, after notice and public hearing as prescribed in Article 5, in the event that he finds that such plan is no longer in conformity with the standards prescribed in, or will not tend to effectuate the purposes of, this chapter. Such hearing may be held upon the motion of the director and shall be held upon receipt of a petition signed by producers, or by the board of directors of any nonprofit agricultural cooperative marketing association which is authorized by its members to so petition. Such petition or petitions shall represent not less than 55 percent of the total number of all producers and not less than 55 percent of the total production of all producers who are eligible to petition the director for the formulation of such plan.

4249. Whenever the director holds a public hearing for the purpose of considering whether or not the minimum prices for fluid milk to be paid to producers by distributors should be modified in order to comply with the provisions of this chapter, the director may also hold a public hearing for the sole purpose of considering the effect of any such proposed change in the prices to be paid to producers by distributors upon the minimum wholesale and minimum retail prices then in effect. Following said

hearing the director may modify said minimum wholesale and minimum retail prices to the extent necessary to reflect any such modifications in prices to be paid to producers by distributors without the necessity of considering or making findings at that time upon the factors, other than the cost of fluid milk to distributors, specified in Sections 4255 and 4260. The hearings authorized in this section may be consolidated pursuant to the applicable provisions of Section 4259.

4254. A full and accurate record of business or acts performed or of testimony taken by the director in pursuance of the provisions of this chapter shall be kept and placed on file in the office of the director.

4255. Any order of the director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

4256. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence, or place of business, may be in several counties and the violations separate and distinct. Any proceeding brought hereunder shall be governed in all other respects by the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

4257. The director may confer, enter into agreements, or otherwise arrange with the constituted au-

thorities of this State, other states, or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this State or as between this State and other states or the United States, and may exercise his powers hereunder to effectuate and enforce such plans.

4260. Whenever the director conducts a survey of the costs of production of fluid milk or fluid cream, or both, in any marketing area, which does not include the costs of production of all of the producers for the area, the director shall, upon request, supply the names and addresses of the producers whose costs were included in such survey to any interested party as a matter of public record.

Article 5. Formation and Adoption of Stabilization and Marketing Plans

4270. The director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream and fluid skim milk are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter. When the director finds, after a public hearing in and for each particular marketing area under consideration for consolidation, that conditions of production and distribution are reasonably uniform in two or more such marketing areas wherein stabilization and marketing plans and minimum wholesale and minimum retail prices are in effect, he may con-

solidate the areas; provided, that at said hearings more than thirty-five (35) percent of the producers present who supply the areas proposed to be consolidated do not object to such consolidation.

4271. The director shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for said area; but if a petition is presented to the director by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

Article 6. Mandatory Provisions

4280. Each stabilization and marketing plan shall contain provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

(a) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream or fluid skim milk business of any customer.

(c) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream or fluid skim milk of like quantity under like terms and conditions.

(d) The false or misleading advertising of fluid milk or fluid cream or fluid skim milk as defined in Sections 17500, 17501, and 17502 of the Business and Professions Code.

(e) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers. Such contract shall include the following: (1) the amount of fluid milk to be purchased for any period; (2) the quantity of such milk to be paid for as Class 1. Such quantity shall be stated in pounds of milk or pounds of milk fat or gallons of milk; provided, that if the price to be paid for such Class 1 milk is established separately for the milk fat and skim milk contained in such milk, such quantity to be paid for as Class 1 shall be stated in pounds of milk or pounds of milk fat or gallons of milk or both in pounds of milk fat and pounds of skim milk separately, but in any marketing area where an equalization pool is a part of a stabilization and marketing plan, such contract need not specify the quantity of milk in any one class; (3) the price to be paid for all milk received;

(4) the date and method of payment for such fluid milk, which shall be that payment shall be made for approximately one-half of the milk delivered in any calendar month not later than the first day of the next following month and the remainder not later than the fifteenth day of said month; (5) the charges for transportation if hauled by the distributor; and (6) a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at or less than the minimum price for fluid milk that is used for Class 3, as said class is defined in Section 4228. The contract may contain such other provisions as are not in conflict with this chapter. A signed copy of such contract shall be filed by the distributor with the director within five days from the date of its execution. The provisions of this subdivision relating to dates of payment shall not apply to contracts for the purchase of fluid milk from nonprofit cooperative associations of producers. The provisions of this subdivision do not apply to the purchase of fluid milk which is necessary to meet an unanticipated increase in demand or an unanticipated shortage in the supply of a distributor; provided, that the quantity of fluid milk so purchased from any one producer or association of producers shall not exceed 1,000 gallons in any one month; and, provided further, that a complete record of all such purchases shall be kept by the distributor and the price paid for such milk by the distributor shall not be less than the price established in the applicable stabilization and marketing plan for the usage to which such milk is applied.

(f) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream or fluid skim milk which is to be or is sold or otherwise disposed of

by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(g) The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of many marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. The provisions of this section with respect to fluid milk shall apply whether or not such fluid milk is received by the distributor as whole milk, or as skim milk and fluid cream, or either, or as any other derivatives of such fluid milk which are reconstituted into such fluid milk, or fluid cream or fluid skim milk for market usage, and whether or not a fluid cream plan has been established for the marketing area.

4280.1. Each such plan shall contain provisions for prohibiting producers and distributors from engaging in the unfair practices hereinafter set forth:

(a) The payment or gift or the offer or promise of any payment or gift of money or other thing of value, directly or indirectly or through any agent or other intermediary, to any person with the purpose or design of inducing such person to become a wholesale customer of any distributor.

4281. Each such plan shall contain provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for fluid milk in the various classes; provided, however, that the prices so designated or prescribed shall be in a reasonable and sound economic relationship with the price of manufacturing milk; provided, further, that in determining such economic relationship the director shall take into consideration all of the relevant factors in such relationship, including but not limited to: (a) the reasonableness and economic soundness of manufacturing milk prices in relation to the costs of producing manufacturing milk; (b) the additional costs of producing and marketing fluid milk over and above costs of producing and marketing manufacturing milk; and (c) current and prospective supplies of fluid milk in relation to current and prospective demands for such fluid milk for all purposes; provided, further, that in designating and prescribing, or in providing methods for designating or prescribing such prices, the director shall also take into consideration all of the purposes, policies, and standards contained in Sections 4200, 4201, 4204, 4205 and 4230; and provided further, the director finds that such prices will insure consumers an adequate and continuous supply of pure, fresh, wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for fluid milk, cream, and skim milk for such marketing area.

4282. Each such stabilization and marketing plan shall contain provisions whereby the director designates and prescribes or provides methods for designat-

ing or prescribing minimum prices to be paid by distributors to producers for fluid milk which is received by a distributor in one marketing area and separated in that area into fluid cream and fluid skim milk when such fluid cream or fluid skim milk or both are transported for utilization into another marketing area or into a locality in which no stabilization or marketing plan is in effect. This section shall not be construed to affect the provisions of this chapter relating to the establishment of minimum wholesale and minimum retail prices for fluid cream.

4283. Each such plan shall contain provisions whereby the director shall provide methods for the establishment of minimum prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, received within a marketing area regardless of whether such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed within or without such marketing area within the jurisdiction of the State of California, and may contain such provisions whether or not such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk is subsequently sold or distributed without the jurisdiction of the State of California. Such stabilization and marketing plans shall provide for the establishment of prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, whether or not such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect. The

stabilization and marketing plan shall provide that producers shall be paid not less than the minimum prices established for the marketing area wherein such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is ultimately sold or distributed, and shall further provide that in the event such fluid milk, fluid cream, of the milk fat or fluid skim milk components of such fluid milk, fluid skim milk, is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, shall be paid by the distributor to the producer thereof at not less than the average of prices paid by distributors, whose plants are located within such area, to producers for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk, but in the event no plants are located within said area, then the price which shall be paid by the distributor to the producer thereof shall not be less than the average of prices paid by distributors to producers for fluid milk, fluid cream, or fluid skim milk, or the milk fat or fluid skim milk components of such fluid milk, at the plants in the nearest marketing areas adjacent to the area where such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is sold or distributed as established by the stabilization and marketing plans in effect in such adjacent marketing areas.

Article 10. Minimum Wholesale and Retail Prices

4350. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter,

the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale and minimum retail prices for fluid milk, or fluid cream, or both, as hereinafter set forth, and to enforce the provisions of this article.

4351. In all marketing areas wherein a stabilization and marketing plan for fluid milk is in effect or is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, minimum wholesale and minimum retail prices for fluid milk, including pasteurized concentrated milk, pursuant to the provisions of this article. In all marketing areas wherein the director has, under a stabilization and marketing plan for fluid milk, prescribed minimum prices to be paid by the distributors for fluid cream, or fluid skim milk, or either or both, the director may designate and prescribe, or provide methods for designating and prescribing minimum wholesale and minimum retail prices for fluid cream, or fluid skim milk, or either or both, pursuant to the provisions of this article. The term "fluid milk" as used in this chapter shall, unless the context otherwise requires or indicates, mean and include the term "fluid skim milk" in the application of this chapter to any marketing area in which the director has exercised his discretion to designate and prescribe, or provide methods for designating and prescribing, minimum wholesale and minimum retail prices for fluid skim milk.

4351.3. In order to meet changes and variations in economic conditions affecting the distribution of fluid milk within a marketing area and to facilitate the consolidation or modification of marketing areas to include within each such area all contiguous territory

wherein conditions of production of fluid milk are reasonably uniform, the director may establish minimum wholesale and minimum retail prices pursuant to this chapter upon a zone basis within the boundaries of a marketing area. Such zones may be established only after a public hearing and shall be established only upon the basis of cost differentials in the distribution of fluid milk between the zones so established within a marketing area as such cost differentials are determined by cost surveys.

4351.5. The director shall terminate the minimum wholesale and minimum retail prices in effect in any marketing area without notice or hearing at any time that there ceases to be a stabilization and marketing plan in force and effect in such marketing area.

4352. Minimum wholesale prices, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor. Minimum wholesale prices, as used herein, includes prices at which fluid milk or fluid cream, or both, shall be sold by distributors to other distributors, other than in bulk, which prices may vary from the minimum prices established for sales by distributors to other wholesale customers and which prices shall be known as "subdistributor prices." A subdistributor price shall be established for each marketing area and when fluid milk or fluid cream, or both, is purchased, other than in bulk, by one distributor from another distributor for sale in a mar-

keting area other than the marketing area where purchased the price paid shall not be less than the minimum subdistributor price for the marketing area in which the fluid milk or fluid cream, or both, is ultimately sold.

4353. Minimum retail prices, as used herein, shall mean minimum prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

4354. In determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed. In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony and may subpoena witnesses. All testimony received at such hearings shall be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or who files a request for the same with the department, by mail or by publication for the time and in the manner prescribed in Section 4273. At the time of giving such notice the director shall mail with such notice to each person to whom such notice is required to be given a written statement showing:

(a) Whether such hearing is held at the instance of the director or in response to written request;

(b) The purpose and scope of such hearing;

(c) A summary of changes in economic factors to the extent such changes have been ascertained by the director in connection with the hearing prior to giving notice thereof;

(d) The proposed minimum prices for fluid milk, fluid cream, or both, together with any other provisions which the director then has under consideration or may then propose to establish for such marketing area, based upon such investigation, cost surveys or examinations, or a statement that the director has not, prior to giving notice of the hearing, formulated any such proposed minimum prices or other provisions.

A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

4355. In determining minimum wholesale and minimum retail prices for fluid milk or fluid cream, or both, for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area in addition to other matters required by this chapter to be taken into consideration by him:

(a) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(b) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(c) The estimated purchasing power of consumers in such marketing area.

(d) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the mini-

mum wholesale prices, as established pursuant to this chapter.

(e) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by distributors, including all costs of hauling, processing, selling and delivering and reasonable return on necessary capital investment, for each of the several methods of distribution used in such marketing area in accomplishing such hauling, processing, selling and delivery, excluding costs which are not reasonably necessary to efficient operation, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of all, or such portion of the distributors in such marketing area as are reasonably determined by the director to be sufficiently representative to indicate the reasonably necessary costs of sufficient efficient distribution for such marketing area.

(f) The estimated amount of the available capacity for processing and distributing fluid milk or fluid cream, or both, of distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

(g) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by retail stores, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of such portion of the retail stores in such marketing areas as are reasonably determined by the director to be sufficiently representative to indicate such costs of all retail stores in such marketing area. In determining such costs incurred by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and

for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

4355.5. In determining minimum wholesale and minimum retail prices for any marketing area, the prices paid by distributors to producers as established pursuant to this chapter shall also be considered as the cost of fluid milk, fluid skim milk, or fluid cream to any association of producers, or other cooperative association, incorporated or unincorporated, engaged in the distributions of fluid milk, fluid skim milk, or fluid cream.

4357. The director shall take into consideration the reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by distributors in hauling, processing, selling and delivering to restaurants, confectioneries or other places for consumption on the premises wherein it is required by law that service to customers be made from the original container or from milk-dispersing devices which have been approved for such use by the director in accordance with Section 461. In fixing the minimum wholesale price to be paid distributors by such persons, the director shall take into consideration such legal requirements and other reasonably necessary factors and distribution costs peculiarly affecting service to such persons, and if the director reasonably determines that such reasonably necessary factors and costs require that the minimum wholesale prices to be paid distributors by such persons vary from the minimum prices established for other wholesale customers, the prices established to be

paid by such persons may vary accordingly. The prices established to be paid by such persons for milk sold in containers designed for use in milk-dispensing devices approved for such use by the director under Section 461 may vary from any of the minimum wholesale prices referred to in this section if the director reasonably determines that the necessary factors and costs involved in such sales require that these prices vary from any of the minimum wholesale prices referred to in this section. Minimum wholesale price schedules for fluid milk, fluid cream, or both, established by the director, may provide for quantity discounts, such discounts to be no more than those which give effect to delivery cost differences in the delivery of single orders of varying quantities of fluid milk, fluid cream, or both, to wholesale customers. Minimum retail price schedules for fluid milk, fluid cream, or both, established by the director for home delivery, may provide for either quantity discounts or delivery service charges, such discounts or service charges to be no more than those which give effect to delivery cost differences in the home delivery of single orders of varying quantities of fluid milk, fluid cream, or both, to retail consumers. Minimum retail price schedules for fluid milk, fluid cream, or both, established by the director for retail stores may provide for quantity discounts, such discounts to be no more than those which give effect to store handling cost differences in the sale of single orders of varying quantities of fluid milk, fluid cream, or both, to retail consumers.

4359. The director shall make or cause to be made such cost surveys or examinations, or both, as are necessary in order to enable him to determine any changes in costs, and in accordance with the provisions of this article, after notice and public hearing called

and held in the same manner prescribed in Section 4354, shall amend any minimum wholesale or minimum retail prices established under the provisions of this chapter in the event that he finds that any such price is, or that any such prices are, no longer in conformity with the standards prescribed therefor, or will not tend to effectuate the purposes of this chapter.

4360. Following such hearings, investigation, surveys or examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area for distributors therein, and minimum retail prices for retail stores therein, which minimum wholesale and minimum retail prices shall be sufficient, but not more than reasonably sufficient, to cover costs, as such costs are described in Section 4355 of this code, according to method of distribution, and reasonable return upon necessary capital investment, and shown to the director by the facts available to the director from the hearings, investigation, surveys or examinations for such marketing area required in this chapter; and the director shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective; provided, however, that whenever the director shall determine from credible evidence that any prices established as hereinabove set forth will not or would not conform to and effectuate the legislative declarations, purposes and intent set forth in this chapter, then he shall instead establish minimum wholesale or minimum retail prices which are higher or lower than those sufficient to cover said costs and reasonable return on capital investment, upon the condition that he shall determine in his judgment and shall find in writing with respect to such higher or lower minimum prices:

(a) That such minimum prices will tend to maintain in the business of distributing fluid milk and fluid cream, or both, such reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds necessary to insure to consumers in such marketing area sufficient distribution facilities to supply the quantity of fluid milk or fluid cream, or both, required by such consumers without requiring such consumers to pay more for their supplies of such fluid milk, or fluid cream, or both, than is necessary to maintain adequate and efficient distribution facilities in such marketing area.

(b) That such minimum prices will not tend to induce or authorize the development of unfair trade practices, unfair competition, conditions of monopoly or combinations in restraint of trade, and that such minimum prices will tend to encourage the orderly and efficient marketing of fluid milk or fluid cream, or both.

4361. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article. The use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, or any retail store, restaurant, confectionery or other place for consumption on or

off the premises buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, is prohibited whether such method, device or transaction applies directly to fluid milk, fluid cream or either, or applies to or is used in connection with the sale or handling of any commodity, product or article. Prohibited methods, devices or transactions shall include, but not be limited to, any one or more of the following: discounts, rebates, free services, advertising allowances, leases of refrigeration or other equipment, gifts, or payments, allowances or credits made or given for, or in connection with, the return of containers or other property, unless such payment, allowance or credit is a repayment of a deposit or charge, in excess of the price established by the director under the provisions of this article, paid by a wholesale customer, or by a consumer, for the return of such containers or other property.

A distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises shall be considered to have violated the provisions of this section if it engages in such violation directly or through an agent, employee, or subsidiary or affiliated company or corporation. For purposes of this section subsidiary or affiliated company or corporation includes, but is not limited to, companies or corporations controlled by the distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises, directly or indirectly, through ownership of issued capital stock or otherwise.

4361.5. The director is hereby authorized and directed to adopt and promulgate rules and regulations for the proper administration and enforcement of the provisions of Section 4361 of this code. Any such rule or regulation or amendment thereof shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4 of Part 1 of Division 3 of Title 2 of the Government Code.

4362. Every distributor in any marketing area wherein an order establishing minimum wholesale and minimum retail prices is in effect, except as otherwise herein provided, shall file with the director schedules and any amendments thereto setting forth the prices at which each such distributor is selling or offering or agreeing to sell fluid milk, fluid cream and dairy products, excluding butter, cheese other than cottage cheese, canned milk, powdered milk, casein and ice cream, in such marketing area. Such filings shall be made in such office of the director as he shall designate. Such prices shall not become effective until the fifth day after filing. Evidence of any sale of, or offer or agreement to sell such fluid milk, fluid cream or dairy products by a distributor, made as a part of, or in connection with the sale of, or offer or agreement to sell fluid milk and fluid cream, or both, in a marketing area where an order establishing minimum wholesale and minimum retail prices is in effect, at less than the prices theretofore filed with the director by such distributor pursuant to the provisions of this section, shall constitute prima facie proof of a violation of this section. Offers and agreements to sell, as used herein, shall include offers and agreements which are conditional, or which shall become effective, upon the filing thereafter of amended prices by the distributor making such offer. Upon

receipt of such amendments, the director shall forthwith date, file and index the same in such manner that the information therein contained shall at all times be kept current and be readily available to any interested person desiring to inspect the same. Any other distributor in the marketing area may meet any such prices so filed: provided, that such distributor shall file with the director a schedule of prices not exceeding the prices so met by him within 24 hours after meeting the same. In the event that any distributor shall elect to make a bid for the sale of fluid milk, fluid cream or other dairy products, excluding butter, cheese other than cottage cheese, canned milk, powdered milk, casein and ice cream, to any city, county, state or federal institution, installation, or facility within the jurisdiction of this State at prices less than the prices applicable to sales to such institutions previously filed with the director by such distributor, then such distributor at its election, in lieu of filing a schedule of amended prices with the director, as hereinabove provided, may deliver to the director, not less than five days before the day scheduled for the opening of bids, a schedule showing the prices contained in such bid, which schedule shall be contained in a sealed envelope with information written or typed on such envelope showing the name of the distributor, the name of the city, county, state, or federal institution, installation, or facility to which fluid milk, fluid cream or such other dairy products are proposed to be supplied as shown in such bid and the date, time and place scheduled for the opening of bids. The envelope containing such schedule shall be stamped by the director showing the time and date received and shall not be opened by the director until after the date

and time scheduled for the opening of bids and shall then be opened and such schedule shall be filed and indexed by the director and shall constitute such distributor's amended schedule of prices covering sales to city, county, state, and federal institutions, installation, or facility and shall be available to any interested person desiring to inspect the same.

Article 11. Distributors' Licenses, Fees and Bonds

4375. No distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director, shall be accompanied by an application fee of three dollars ($3), and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for renewal of a license for the following year by a licensee, together with the application fee of three dollars ($3), shall be made prior to the expiration date of the license held, and if not so made the applicant shall pay an additional sum equal to 100 percent of the application fee before such license shall be issued.

4376. Every distributor before purchasing any fluid milk or fluid cream from a producer must execute and deliver to the director a surety bond in the minimum sum of one thousand dollars ($1,000), executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety. Said bond shall be upon a form approved by the director, and shall be conditioned upon the payment in the manner required by this chapter, of all amounts due to producers for fluid milk and fluid cream purchased by such licensee or applicant during the license year. Said bond shall be to the State in favor of every producer of fluid milk and fluid cream. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by this chapter, the director shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. Thereupon the director shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the director may require the filing of a new bond and immediately upon a recovery in any action upon such bond, such distributor shall file a new bond, and upon failure to file same within ten (10) days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event that recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro rata among said producer-creditors.

4377. The minimum bond of one thousand dollars ($1,000) shall be required of distributors purchasing an average daily quantity of fluid milk of less than 100 gallons; distributors purchasing an average daily quantity of 100 gallons and less than 200 gallons during any calendar month during a license year must post a bond in the amount of two thousand dollars ($2,000); distributors purchasing an average daily quantity of 200 gallons and less than 300 gallons during any calendar month during a license year must post a bond in the amount of three thousand dollars ($3,000); distributors purchasing an average daily quantity of 300 gallons or more during any calendar month during a license year shall post a bond in the sum of five thousand dollars ($5,000).

Article 14. Penalties

4410. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4361.5, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the pro-

ducer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(e) Any person who violates any provision of this chapter or of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream or any rule or regulation duly adopted and promulgated by the director under Section 4361.5 shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

Article 15. Disciplinary Proceedings

4415. The director may refuse to grant any license herein provided and may revoke or suspend any such license as the case may require when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or any rule or regulation duly adopted and promulgated by the director under Section 4361.5. The proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all the powers granted therein.

The decision may include an order refusing, revoking or suspending the license applied for or held by

the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formualted under the provisions of this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4361.5.

After any decision including any conditional or probationary orders, should respondent fail, refuse or neglect to comply with any such orders, the director may suspend or revoke the license in accordance with the procedure provided in this section.

Previous violation by any applicant, or by any person connected with said applicant, of any provision of this chapter, or of any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream, formulated under the provisions of this chapter, or any rule or regulation duly adopted and promulgated by the director under Section 4361.5, shall be good and sufficient ground for denial, revocation or suspension of a license.

4416. Whenever the director is satisfied, either by investigation or after hearing, that a distributor is unable to pay for fluid milk and or fluid cream purchased from producers, and is further satisfied that to permit the distributor to continue to purchase and receive fluid milk and or fluid cream from producers would be likely to cause serious and irreparable loss to producer-creditors and other producers, then the

director within his discretion may thereupon and forthwith shorten the time for hearing that is provided for in Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and thereupon may issue an order to show cause why the license of said distributor should not be forthwith suspended or revoked; provided, however, that the time of notice of said hearing shall in no event be less than five days. At such hearing the distributor proceeded against shall be ordered to show cause why his or its license should not be suspended or revoked or continued under such conditions and provisions, if any, as the director may consider just and proper and for the protection of the best interests of the producer creditors and producers from whom the distributor has been and is receiving fluid milk and or fluid cream. Following such hearing, the decision of the director shall become effective at his discretion.

Said hearing, in the case of such emergency, may be called upon written notice, said notice to be served personally or by mail on the distributor involved and may be held at the nearest office of the director or at such place as may be most convenient in the discretion of the director for the attendance of all parties involved.

Article 16. Construction and Interpretation

4420. (a) The Legislature hereby declares that Chapter 17 of Division 6 of this code is intended to formulate a comprehensive scheme for the regulation of marketing and distribution of fluid milk and fluid cream. If, however, any provision of, or addition or amendment to, said Chapter 17 of Division 6 of this code, either as originally enacted in 1935 at the Fifty-

first Regular Session of the California Legislature, or as amended or added to or recodified or re-enacted at any subsequent session of the California Legislature, should be held to be unconstitutional, the unconstitutionality of such provision shall not affect any other provision of said chapter.

(b) If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional.

POLITICAL CODE SECTION 34 AS AMENDED BY CHAPTER 710, STATUTES OF 1939, PAGE 2231

The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts

of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract or land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States.

Statutory History

1872 Pol. C. sec. 34, eff. March 12, 1872, amended by Stats. 1939, Ch. 710, p. 2231, codified into Gov. C. sec. 111, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 1009, until repealed eff. Sept. 19, 1947, by Stats. 1947, Ch. 1532, p. 3163.

STATUTES OF 1897, CHAPTER 56, PAGE 51

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description

by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

SEC. 2. This Act shall take effect immediately.

Statutory History

Stats. 1897, Ch. 56, p. 51, eff. March 2, 1897, codified into Gov. C. sec. 114, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 19, 1947, by Stats. 1947, Ch. 1532, p. 3163.

SECTIONS 111 AND 114, GOVERNMENT CODE

111. The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article.

114. The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes, reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of

the lands shall first be filed in the proper office of record in the county in which the lands are situated.

(Stats. 1943, Chapter 134, pp. 898, 899)

GOVERNMENT CODE SECTION 113 AS AMENDED BY STATUTES OF 1947, CHAPTER 1532, PAGE 3164

SEC. 2. Section 113 of said code is amended to read:

113. The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

GOVERNMENT CODE SECTION 126 AS AMENDED BY STATUTES OF 1947, CHAPTER 1532, PAGE 3163

SECTION 1. Section 126 of the Government Code is amended to read:

126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved

March 1, 1911, (36 Stat. 961) known as the 'Weeks Act';

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Lands Commission provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 17

"The Congress shall have power . . .

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;"

ARMED SERVICES PROCUREMENT ACT OF 1947, 62 STATUTES 21, 10 U.S.C. 2301 et seq.

AN ACT

To facilitate procurement of supplies and services by the Department of the Army, the Navy and the Air Force, the Coast Guard, and the National Advisory Committee for Aeronautics, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Armed Services Procurement Act of 1947."

SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

(b) It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns. Whenever it is proposed to make a contract or purchase in excess of $10,000 by negotiation and without advertising, pursuant to the authority of paragraph (7) or (8) of section 2 (c) of this Act, suitable advance publicity, as determined by the agency head with due regard to the type of supplies involved and other relevant considerations, shall be given for a period of at least fifteen days, wherever practicable, as determined by the agency head.

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due

consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided*, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as deter-

mined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 3, unless such contract

is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), (12), or (15) of subsection (c) of this section.

SEC. 3. Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest to do so.

SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul

such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract not an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the

right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

SEC. 5. (a) The agency head may make advance payments under negotiated contracts heretofore or hereafter executed in any amount not exceeding the contract price upon such terms as the parties shall agree: *Provided*, That advance payments shall be made only upon adequate security and if the agency head determines that provision for such advance payments is in the public interest or in the interest of the national defense and is necessary and appropriate in order to procure required supplies or services under the contract.

(b) The terms governing advance payments may include as security provision for, and upon inclusion of such provision there shall thereby be created, a lien in favor of the Government, paramount to all other liens, upon the supplies contracted for, upon the credit balance in any special account in which such payments may be deposited and upon such of the material and other property acquired for performance of the contract as the parties shall agree.

SEC. 6. Whenever any contract made on behalf of the Government by the agency head or by officers authorized by him so to do includes a provision for liquidated damages for delay, the Comptroller General on the recommendation of the agency head is authorized and empowered to remit the whole or any part of such damages as in his discretion may be just and equitable.

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and con-

tracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c), except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

SEC. 8. No purchase or contract shall be exempt from the Act of June 30, 1936, as amended (49 Stat. 2036, as amended by the Act of June 28, 1940, 54 Stat.

681, and by the Act of May 13, 1942, 56 Stat. 277; U. S. C., title 41, secs. 35 to 45) or from the Act of March 3, 1931, as amended (46 Stat. 1494, as amended by the Act of August 30, 1935, 49 Stat. 1011; and by the Act of June 15, 1940, 54 Stat. 399; U. S. C., title 40, secs. 276a to 276a–6), solely by reason of having been entered into pursuant to section 2 (c) hereof without advertising, and the provisions of said Acts and of the Act of June 19, 1912, as amended (37 Stat. 137, as amended by the Act of September 9, 1940, 54 Stat. 884; U. S. C., title 40, secs. 324 and 325a), if otherwise applicable, shall apply to such purchases and contracts.

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

(b) The term "supplies" shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof.

SEC. 10. In order to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services required by such agencies, subject to the limitations contained in section 7 of this Act, each agency head may make such assignments and delegations of procure-

ment responsibilities within his agency as he may deem necessary or desirable, and the agency heads or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. Appropriations available to any such agency shall be available for obligation for procurement as provided for in such appropriations by any other agency through administrative allotments in such amount as may be authorized by the head of the allotting agency without transfer of funds on the books of the Treasury Department. Disbursing officers of the allotting agency may make disbursements chargeable to such allotments upon vouchers certified by officers or civilian employees of the procuring agency.

SEC. 11. (a) The following Acts are hereby repealed:

Revised Statutes, section 3716 (U. S. C., title 10, sec. 1202);

Revised Statutes, section 3717 (U. S. C., title 41, sec. 9);

Revised Statutes, section 3718 (U. S. C., title 34, sec. 561);

Revised Statutes, section 3719 (U. S. C., title 34, sec. 562);

Revised Statutes, section 3720 (U. S. C., title 34, sec. 563);

Revised Statutes, section 3721, as amended (U. S. C., title 34, secs. 569-570);

Revised Statutes, section 3722 (U. S. C., title 34, sec. 572);

Revised Statutes, section 3723 (U. S. C., title 34, sec. 573);

Revised Statutes, section 3724 (U. S. C., title 34, sec. 574);

Revised Statutes, section 3726 (U. S. C., title 34, sec. 577);

Revised Statutes, section 3727 (U. S. C., title 34, sec. 578);

Revised Statutes, section 3729 (U. S. C., title 34, sec. 579);

Act of June 14, 1878, Numbered 30 (20 Stat. 253; U. S. C., title 34, sec. 565);

Act of March 3, 1893 (ch. 212, sec. 1, 27 Stat. 732; U. S. C., title 34, sec. 566);

Act of March 2, 1907 (ch. 2512, 34 Stat. 1193; U. S. C., title 34, sec. 571);

Act of March 4, 1913 (ch. 148, 37 Stat. 904; U. S. C., title 34, sec. 575);

Act of June 30, 1914 (ch. 130, 38 Stat. 398; U. S. C., title 34, sec. 567);

Act of May 15, 1936 (ch. 400, 49 Stat. 1277; U. S. C., title 10, sec. 1199 (a));

Act of July 13, 1939 (ch. 265, 53 Stat. 1000; U. S. C., title 10, sec. 313).

(b) The following Acts shall not apply to the procurement of supplies or services by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, Treasury Department, or the National Advisory Committee for Aeronautics:

Revised Statutes, section 3709, as amended (U. S. C., title 41, sec. 5);

Revised Statutes, section 3735 (U. S. C., title 41, sec. 13);

Act of October 10, 1940, ch. 851, sec. 1, 54 Stat. 1109, as amended (U. S. C., title 41, secs. 6 and 6a).

(c) The following parts of Acts are hereby repealed:

(1) That portion of the Act making appropriations for fortifications, approved February 24, 1891 (26 Stat. 769), relating to "Armament of fortifications", which reads as follows: "*Provided*, That no contract for the expenditure of any portion of the money herein provided, or that may be hereafter provided, for the purchase of steel shall be made until the same shall have been submitted to public competition by the Department by advertisement."

(2) Those portions of the Army Appropriation Acts approved March 2, 1901 (ch. 803, 31 Stat. 905; U. S. C., title 10, sec. 1201); and June 30, 1902 (32 Stat. 514), relating to "Quartermaster's Department, Regular Supplies", which read as follows: "*Provided further*, That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement, and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered."

(3) That portion of the Army Appropriation Act approved June 12, 1906 (ch. 3078, 34 Stat. 258; U. S. C., title 10, sec. 1205), relating to "Ordinance Department", which reads as follows: "Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among businessmen, when the aggregate of the amount required does not

exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe."

(4) That portion of the Army Appropriation Act, approved May 11, 1908 (ch. 163, 35 Stat. 125; U. S. C., title 10, sec. 1199), relating to "Ordnance Department", which reads as follows: "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

(5) That portion of the War Department Appropriation Act, approved May 15, 1936 (49 Stat. 1299), relating to "Arms, uniforms, equipment, and so forth, for field service, National Guard", which reads as follows: "*Provided*, That specifications for motor vehicles, which shall be so drawn as to admit of competition, shall to the extent otherwise practicable conform with the requirements of the National Guard."

(d) All other laws and parts of laws to the extent that they are inconsistent with this Act are hereby repealed.

SEC. 12. The Secretary of the Navy shall have the same authority with respect to contracts of the Department of the Navy as the Secretary of the Army has with respect to contracts of the Department of the Army under the Act of April 10, 1878, as amended (20 Stat. 36, as amended by the Act of March 3, 1883, 22 Stat. 487; U. S. C., title 5, sec. 218). The Secretary of the Army and the Secretary of the Air Force shall have the same authority with respect to emergency

purchases of war material abroad as the Secretary of the Navy has with respect to such purchases under the Act of June 30, 1914 (38 Stat. 399; U. S. C., title 34, sec. 568).

SEC. 13. This Act shall become effective ninety days after the date of enactment.

Approved February 19, 1948.

LANHAM ACT, 54 STATUTES 1125, CHAPTER 862

To expedite the provision of housing in connection with national defense, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. In order to provide housing for persons engaged in national-defense activities, and their families, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the 'Administrator') is authorized:

"(a) To acquire prior to the approval of title by the Attorney General (without regard to sections 1136, as amended, and 3709 of the Revised Statutes) improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to section 322 of the Act of June 30, 1932 (47 Stat. 412), as amended, the Act of March 3, 1877 (19 Stat. 370), or any time limit on the availability of funds for the payment of rent), or condemnation (including proceedings under the Acts of August 1, 1888 (25

Stat. 357), March 1, 1929 (45 Stat. 1415), and February 26, 1931 (46 Stat. 1421)).

"(b) By contract or otherwise (without regard to sections 1136, as amended, and 3709 of the Revised Statutes, section 322 of the Act of June 30, 1932 (47 Stat. 412), or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor) prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, machinery, and do all things necessary in connection therewith to carry out the purposes of this Act: *Provided*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used, but this proviso shall not be construed to prevent the use of the cost-plus-a-fixed-fee form of contract: *Provided*, That the cost per family dwelling unit shall not exceed an average of $3,000 for those units located within the continental United States nor an average of $4,000 for those located elsewhere, and the cost of no family dwelling unit shall exceed $3,950 within the continental United States or $4,750 elsewhere, exclusive of expenses of administration, land acquisition, public utilities, and community facilities,

and the aggregate cost of community facilities shall not exceed 3 per centum of the total cost of all projects.

"SEC. 2. As used in this Act (a) the term 'persons engaged in national-defense activities' shall include (1) enlisted men in the naval or military services of the United States; (2) employees of the United States in the Navy and War Departments assigned to duty at naval or military reservations, posts, or bases; (3) workers engaged or to be engaged in industries connected with and essential to the national defense; (b) the term 'Federal agency' means any executive department or office (including the President), independent establishment, commission, board, bureau, division, or office in the executive branch of the United States Government, or other agency of the United States, including corporations in which the United States owns all or a majority of the stock, directly or indirectly.

"SEC. 3. The sum of $150,000,000, to remain available until expended, is hereby authorized to be appropriated to carry out the purposes of this Act in accordance with the authority therein contained and for administrative expenses in connection therewith: *Provided, however,* That the Administrator is authorized to reimburse, from funds which may be appropriated pursuant to the authority of this Act, the sum of $3,300,000 to the emergency funds made available to the President under the Act of June 11, 1940, entitled 'An Act making appropriations for the Navy Department and the naval service for the fiscal year ending June 30, 1941, and for other purposes' (Public, Numbered 588), and the sum of $6,700,000 to the emergency funds made available to the President

under the Military Appropriation Act, 1941, approved June 13, 1940 (Public, Numbered 611):

"SEC. 4. When the President shall have declared that the emergency declared by him on September 8, 1939, to exist, has ceased to exist (a) the authority contained in section 1 hereof shall terminate except with respect to contracts on projects previously entered into or undertaken and court proceedings then pending, and (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest.

"SEC. 5. Where any Federal agency has funds for the provision of housing in connection with national-defense activities it may, in its discretion, make transfers of those funds, in whole or in part, to the Administrator, and the funds so transferred shall be available for, but only for, any or all of the objects and purposes of and in accordance with all the authority and limitations contained in this Act, and for administrative expenses in connection therewith.

"SEC. 6. Moneys derived from rental or operation of property acquired or constructed under the provisions of this Act shall be returned to the appropriation authorized by this Act and shall be available for expenses of operation and maintenance including administrative expenses in connection therewith, and the unobligated balance of the moneys so deposited shall be covered into the Treasury at the end of each fiscal year as miscellaneous receipts.

"SEC. 7. Notwithstanding any other provisions of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters, the Administrator, with respect to any property acquired or constructed under the provi-

sions of this Act, is authorized by means of Government personnel, selected qualified private agencies, or public agencies (a) to deal with, maintain, operate, administer, and insure; (b) to pursue to final collection by way of compromise or otherwise, all claims arising therefrom; (c) to rent, lease, exchange, sell for cash or credit, and convey the whole or any part of such property and to convey without cost portions thereof to local municipalities for street or other public use: *Provided*, That any such transaction shall be upon such terms, including the period of any lease, as may be deemed by the Administrator to be in the public interest: *Provided further*, That the Administrator shall fix fair rentals, on projects developed pursuant to this Act, which shall be within the financial reach of persons engaged in national defense: *Provided further*, That any lease authorized hereunder shall not be subject to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

"SEC. 8. In carrying out the provisions of this Act the Administrator is authorized to utilize and act through the Federal Works Agency and other Federal agencies and any local public agency, with the consent of such agency, and any funds appropriated pursuant to this Act shall be available for transfer to any such agency in reimbursement therefor. Nothing in this Act shall be construed to prevent the Administrator from employing or utilizing the professional services of private persons, firms, or corporations.

"SEC. 9. The Administrator may enter into any agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so

paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation.

"SEC. 10. Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property.

"SEC. 11. The Administrator is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act, and shall establish reasonable standards of safety, convenience, and health.

"SEC. 12. Notwithstanding any other provision of law, the wages of every laborer and mechanic employed on any construction, repair or demolition work authorized by this Act shall be computed on a basic day rate of eight hours per day and work in excess of eight hours per day shall be permitted upon compensation for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. Not less than the prevailing wages shall be paid in the construction of defense housing authorized herein.

"SEC. 13. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of this Act, or application of such provision to other persons or circumstances shall not be affected thereby.

"SEC. 14. At the beginning of each session of Congress, the Administrator shall make to Congress a

full and detailed report covering all of the transactions authorized hereunder.

"Approved, October 14, 1940."

R.S. 355, AS AMENDED BY ACT OF OCTOBER 9, 1940, 54 STAT. 1083

To amend section 355 of the Revised Statutes, as amended, to authorize the Attorney General to approve the title to low-value lands and interests in lands acquired by or on behalf of the United States subject to infirmities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 355 of the Revised Statutes of the United States, as amended, is hereby amended to read as follows:

"'SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.

"'Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: *Provided*, That the total value of any lands

or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except roads, trails, and fire-protection improvements) on any site, tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this Act, values of lands and interests in land shall be determined by the consideration paid or to be paid.

"The Attorney General is hereby authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

"Nothing in this Act shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this Act be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

"The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

"The Attorney General may, in his discretion, base any opinion as to title required either by this Act or any other law upon either or both of the following: Certificates of title of title companies or such evidence of title as he may deem satisfactory.

"The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of War, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on the date this section as amended takes effect with respect to the approval by them of title to land or interests in land acquired by the War Department or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law, be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for the acquisition or improvement of easements and rights-of-way by the Department of Agriculture for forest and other conservation purposes

where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500; and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

"Approved, October 9, 1940."

APPENDIX C

State Milk Stabilization Statutes

Alabama Code of Alabama, 1955 Revision, Title 22, Sec. 205 et seq.

Arkansas Stats. 1955, Secs. 70-701 et seq.

California Agricultural Code, Division 6, Chapter 17, Sections 4200 through 4420, inc.

Connecticut Connecticut General Statutes 1958 Revision, Title 22, Chapter 431, Secs. 205 et seq.

Florida Florida Statutes, 1957 Revision, Chapter 501, Secs. 501.01 et seq.

Georgia Code of Georgia Annotated, 1957 Revision, Title 42, Secs. 42.524 et seq.

Louisiana West's Statutes Annotated, 1958 Revision, Title 40, Secs. 940.1 et seq.

Maine Revised Statutes 1957 Supplement, Chapter 33, Secs. 1 et seq.

Massachusetts Annotated Laws 1958, Chapter 94A, Secs. 1 et seq.

Montana Revised Code 1957 Supplement, Title 27, Secs. 27-400 et seq.

Nevada Revised Statutes 1958, Secs. 584.350 et seq.

New Hampshire Revised Statutes 1957, Title XIV, Chapter 183, Secs. 183.1 et seq.

New Jersey Annotated Statutes 1958, Title 4, Secs. 4.12A-1 et seq.

New York New York Consolidated Laws Annotated, Book 2B, 1958 Revision, Secs. 253 et seq.

North Carolina North Carolina General Statutes: 1957 Revision, Article 28B, Secs. 106.266.6 et seq.

Oregon Oregon Laws, 1961, Ch. 529.

South Carolina Code of South Carolina, 1952, Secs. 32-1634, et seq.

Pennsylvania Purdom's Pennsylvania Annotated Statutes, 1958 Revision, Title 31, Secs. 700J-103 et seq.

Rhode Island General Laws of Rhode Island 1958, Title 21, Secs. 21-4-1 et seq.

Vermont Vermont Statutes Annotated 1948, Title 6, Secs. 2502 et seq.

Virginia Code of Virginia 1958, Title 3, Secs. 3-346 et seq.

Washington Session Laws of Washington 1961, Ch. 298.

State milk stabilization statutes have been held constitutionally valid in 16 states:

Alabama:

Franklin v. *State ex rel. Alabama State Milk Control Board*, 1936, 232 Ala. 637, 169 So. 295

California:

Jersey Maid Milk Products Co. v. *Brock*, 1939, 13 Cal. 2d 620, 91 P. 2d 577

Connecticut:

State v. *Stoddard*, 1940, 126 Conn. 623, 13 A. 2d 586

Florida:

Shiver v. *Lee*, Fla. 1956, 89 So. 2d 318

Indiana:

Albert v. Milk Control Board, 1936, 210 Ind. 283, 200 N.E. 688

Louisiana:

Schwegmann Brothers Giant Super Markets v. McCrory, 1959, 237 La. 768, 112 So. 2d 606

Michigan:

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Wisconsin:

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APPENDIX D

LEGISLATIVE HISTORY OF CONSTITUTION ARTICLE I, SECTION 8, CLAUSE 17

The original draft of section 17 submitted to the Constitutional Convention on September 5, 1787, would have granted the Congress power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by Cession of particular States and the acceptance of the Legislature become the seat of the Government of the U—S— and to exercise like authority over all places purchased for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings". Debates on the Confederation and Constitution, Elliott, Vol. 5, p. 510-511; The Records of the Federal Convention, Farrand, Vol. 2, p. 509. In debate Massachusetts delegate Elbridge Geary raised the objection that the power to acquire sites without state consent "... might be made use of to enclave any particular

state by buying up its territory; and that the strongholds proposed would be means of owing the state into an undue obedience to the general government." Elliott, op cit, p. 511; Farrand, op cit, p. 510. In response to this objection, the Convention added the requirement that the purchase of forts and arsenals be with "the consent of the Legislature of the State in which the same shall be." Elliott, op cit, pp. 511-512; Farrand, op cit, p. 510.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 19

UNITED STATES OF AMERICA, *Appellee*,

vs.

CHARLES PAUL, *Director of Agriculture of the State of California*, AND STANLEY MOSK, *Attorney General, State of California, Appellants*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF THE STATE OF NEVADA AS AMICUS CURIAE

CHARLES E. SPRINGER
Attorney General of the State of Nevada
Supreme Court Building, Carson City, Nevada

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Special Deputy Attorney General for Nevada

ROBERT Y. THORNTON
Attorney General of the State of Oregon

DON PARKER
Assistant Attorney General for Oregon

August 25, 1962

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CHARLES PAUL, *Director of Agriculture of the State of California*, AND STANLEY MOSK, *Attorney General, State of California, Appellants*.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF THE STATE OF NEVADA AS AMICUS CURIAE

The State of Nevada files this brief as amicus curiae under the provisions of Rule 42 of the Rules of the Supreme Court of the United States. Consent to the filing of this brief need not be had under the provisions of Section 4 of said Rule 42.

INTEREST OF THE STATE OF NEVADA

In 1955, the State of Nevada enacted legislation regulating the stabilization and marketing of fluid milk and fluid cream (Nevada Revised Statutes, Sections 584.325 to 584.690 inclusive). Four years later, in 1959, the Nevada Stabilization and

Marketing Act was amended to provide for the determination and fixing of minimum prices for the sale of fluid milk and fluid cream (Nevada Revised Statutes, 584.568). This act, with the minimum price provisions, is still in force and effect.

The problem in the State of California which is the subject of this appeal is of substantial interest to the State of Nevada. The legislature of the State of Nevada has declared the production and distribution of milk to be a business affected with a public interest. The State of Nevada has chosen to regulate the production and distribution of milk in the exercise of its police power to protect the health and welfare of its citizens (Nevada Revised Statutes, Sections 584.390, 584.395). The State of California has made similar declarations of fact and policy and has likewise acted in the exercise of its police power (California Agricultural Code, Sections 4200, 4201).

There are no decisions in the highest court of the State of Nevada interpreting or construing the Nevada Stabilization and Marketing Act. It is worthy of note that for a period of four years, from 1955 to 1959, there were no pricing provisions in the Nevada Stabilization and Marketing Act. It must also be noted that the 1959 amendment (Nevada Revised Statutes, Section 584.568) made the determination and fixing of minimum sales prices mandatory, rather than optional, in each stabilization and marketing plan. Clearly, the Nevada legislature believed it necessary to establish minimum prices for the sale of milk.

The State of Nevada has divided milk into three classifications according to usage. Milk which is sold for human consumption as market milk is identified as Class I (Nevada Revised Statutes, Section 584.480). This is the same class of milk as that involved in the sales in California which were the subject of the decision of the District Court in this action below. In 1961, the State of Nevada produced a total of 2,742,209 pounds of butterfat used

in Class I consumption. A total of 208,979 pounds of butterfat, amounting to 7.6 percent of Nevada production, was sold to Federal installations in Nevada during 1961.

If the decision of the three-judge District Court below is allowed to stand, the ultimate effect will be to impair the regulation of an important industry affecting the public health and welfare of the citizens of the State of Nevada. In the absence of the assertion of Federal police power, in this field, Nevada should be permitted to continue this essential regulation. This brief is filed at the request of the State Dairy Commission of the State of Nevada, acting by and through the Attorney General of the State of Nevada, to protect the dairy industry of the State of Nevada and to protect the health and welfare of the citizens of the State of Nevada.

ARGUMENT

It is the position of the State of Nevada that the judgment of the three-judge District Court is in error as conflicting with congressional policy and with the various decisions of the Supreme Court of the United States. The State of Nevada as amicus curiae is in full and complete agreement with the arguments presented by the State of California in this action. To repeat the arguments of the State of California would be redundant. The State of Nevada joins in such arguments without reiteration.

CONCLUSION

The State of Nevada requests the Court to decide that the State of California may constitutionally enforce both the minimum producer and minimum wholesale provisions of its milk stabilization act against distributors and producers selling fluid milk to the United States and to resolve the issues presented on this appeal

in favor of the State of California. The State of Oregon joins in such request and supports the position of the State of California.

Respectfully submitted,

CHARLES E. SPRINGER
Attorney General of the State of Nevada
Supreme Court Building
Carson City, Nevada

LOUIS MEAD DIXON
Special Deputy Attorney General for Nevada

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UNITED STATES OF AMERICA,
Appellee,

v.

CHARLES PAUL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA AND STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA,
Appellants.

BRIEF OF FREDERICK T. GRAY ATTORNEY GENERAL OF THE STATE OF VIRGINIA AMICUS CURIAE

FREDERICK T. GRAY
Attorney General of the State of Virginia

M. HARRIS PARKER
Assistant Attorney General of the State of Virginia

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In the

Supreme Court of the United States

October Term, 1961

No. 239

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES PAUL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA AND STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA,

Appellants.

BRIEF OF FREDERICK T. GRAY ATTORNEY GENERAL OF THE STATE OF VIRGINIA AMICUS CURIAE.

To the Honorable Supreme Court of the United States:

The State of Virginia, as Amicus Curiae, sponsored herein by its Attorney General, Frederick T. Gray, respectfully moves leave of this Honorable Court to the filing of a brief in the above entitled and numbered cause, and submits for filing the following Amicus Curiae brief:

INTEREST OF THE AMICUS CURIAE

The State of Virginia has a direct interest in this case inasmuch as many military installations are located on its

soil which handle milk purchased by the Department of Defense under the Armed Services Procurement Act of 1947 (62 Stat. 21).

The purchase of milk by the Department of Defense for use on these installations, at prices less than those which others in this State are required to pay under the Statutes of this State and the rules and regulations promulgated thereunder, is detrimental to the dairy farmers of this State and may lead to chaotic conditions in an otherwise stable milk economy.

ARGUMENT

The present status of this case according to latest information obtained by this Amicus Curiae, is that of application to your Honorable Court to hear oral argument and receive briefs on the merits in this case prior to rendering a decision thereon.

The appellant or movant therefore urges the court to proceed forthwith to hear oral arguments and receive briefs on the merits in this case for the following reasons:

I.

The Injunction Extends Federal Immunity from the State Regulation Beyond Existing Precedents.

The District Court in this case enjoined the defendant state officers from enforcing with respect to milk purchased by the United States:

> "either the state minimum producer price, [or] wholesale price . . . regulations promulgated by the Director of Agriculture pursuant to the California Milk Stabilization Act." (R. ——)

This sweeping injunction carries the immunity from state regulation beyond persons who contract with the United States to include the supplier of those persons. As a result, prices to the California dairy farmer have dropped below their cost of production and are causing losses of $6,000,000.00 per year. Should this decision stand, the Virginia dairy farmer may well suffer a similar loss.

II.

The Decision Conflicts with Congressional Policy

In striking down the California milk stabilization act, as applied, the District Court withdrew state protection from the dairy farmer, a class of persons whose welfare has been expressly considered by Congress. Section 204(a), of the Agricultural Act of 1954, 68 Stat. 899, declares:

> "It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products . . . and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy."

There is no implication that implementation of this policy was to be confined to the federal government. No conflict with state law is present since the purpose of the California statute is to afford a measure of economic security to dairy farmers in the interest of protecting the public milk supply. *In re Willing*, 12 Cal. 2d 591, 594. The same may be said of the provisions of Chapter 17, Title 3 of the Code of Virginia of 1950 (Secs. 3-346 through 3-383).

III.

Absent Conflict, the California Milk Stabilization Act Was Assimilated as Federal Law on the Military Installations in Question

Absent conflict with federal statute, the laws of the state existing at the time of the surrender of sovereignty are carried over into the law of the federal area. This assimilation of state law assures that the area involved will continue to have a developed legal system. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 99 (1940); *Chicago, R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 542, 546 (1885). The application of this rule to state regulatory acts was recognized in *Pacific Coast Dairy* v. *Dept.*, 318 U. S. 285, the Court saying:

> "When the federal government acquired the tract (Moffett Field), local law not inconsistent with federal policy remained in force until altered by national legislation." (318 U. S. 285, 294.)

Assimilation was found inapplicable however, because the California milk stabilization act was adopted after the transfer of sovereignty. In this case, this reverse is true. The transfers of sovereignty found by the District Court occurred subsequent to 1941, long after the 1935 enactment of the milk stabilization act. California Statutes of 1935, Chapter 241, page 922, as amended by Statutes of 1937, Chapter 3, page 42. It follows that, absent conflict, the California act remained in force in the three enclaves directly in question and that California may apply its minimum milk price regulations to the distributor with respect to the sale of milk occurring on the military bases here involved.

CONCLUSION

For the foregoing reasons, it is submitted that the questions presented by this appeal are substantial, and are important to state-federal relations, and call for resolution by this Court.

Respectfully submitted,

FREDERICK T. GRAY
Attorney General of the State of Virginia

M. HARRIS PARKER
Assistant Attorney General of the State of Virginia

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Brief of Amicus Curiae

FORREST H. ANDERSON,
Attorney General for the State of Montana.

GEOFFREY L. BRAZIER,
Special Ass't. Attorney General for the State of Montana,
Amicus Curiae

In the Supreme Court of the United States

OCTOBER TERM, 1961

No._____

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Brief of Amicus Curiae

STATEMENT OF INTEREST OF AMICUS CURIAE

Your Petitioner is the duly elected, qualified and acting Attorney General of the State of Montana, which state administers a milk stabilization act by means of a public agency, and, as such Attorney General, your petitioner appears herein in the interest of the State of Mon-

tana and of the dairy farmers and distributors of said state.

ARGUMENT

The State of Montana is vitally interested in the judicial solution of the question presented in Appellants' Jurisdictional Statement of Facts herein, and for that reason, the State of Montana urges the Honorable Supreme Court of the United States to hear oral argument and receive briefs on the merits in the above-entitled case.

The State of Montana has a milk stabilization act similar to that of the State of California wherein the minimum price of fluid milk to dairy farmers, as well as minimum retail and wholesale prices for fluid milk and cream products are regulated by a public governmental agency of the state.

Because Montana is a relatively unpopulated state, sales of fluid milk and cream products to Federal agencies and institutions therein consume a substantial portion of the milk supplied by dairy farmers in the state. Presently, sales to the Malmstrom Air Force Base at Great Falls, Montana, the Veterans Administration Hospital at Fort Harrison, Montana, and to various radar installations in the northern part of the state consume approximately one million pounds of milk a month. This consumption represents a monthly income to dairy farmers of more than Fifty-three Thousand Dollars ($53,000.00) per month under present state administrative control. With anticipated

completion of current construction projects of an Air Force base near Glasgow, Montana, expansion of the VA hospital at Fort Harrison, Montana, and a complex of intercontinental ballistic missile sites, it is anticipated that consumption by Federal agencies and institutions in Montana, will soon double its present quantity.

Montana has had administrative milk control since 1935 in the interest of protecting and promoting public welfare and eliminating unfair and demoralizing trade practices in the fluid milk industry of the state. Revised Codes of Montana, 1947, 27-402.

The effect of the Order of United States District Court for the Northern District of California, dated and entered March 27, 1961, in the case of United States of America v. Charles Paul, Director of Agriculture, et al., will be to usurp upon the jurisdiction of the public milk control agency of the State of Montana to such an extent as to render it ineffective throughout the state and thereby to defeat the purpose of said agency which the Legislature of the State of Montana, in its wisdom, created to protect the welfare of the public of the State.

Absence of control over the prices of milk sold by Federal institutions and agencies makes inroads upon the otherwise stabilized milk marketing structure of the State in two ways: 1. The disparity in retail prices between milk sold on Federal reservations and milk sold in adjacent state market areas has a powerful impact upon the retail

price for fluid milk and cream products not sold on Federal property, forcing down the retail prices of such products and causing a loss in the marketing thereof which is passed back to producers. Prices established by the State agency are based upon the costs of ordinarily efficient dealers marketing milk in the area. When substantial price competition below the duly established minimums exists, it has a tendency to eliminate not only all but the most efficient distributors from business, but also the dairy farmers who supply them.

2. The Federal institutions already consume such a large supply of milk that economic pressure has been put upon producers supplying the milk to those institutions, causing the producers economic loss. Increased pressure on these producers will force prices to them down far enough to put them out of business, thereby jeopardizing the supply of milk to the entire state.

It further appears to your petitioner that the March 27, 1961, order of the U. S. District for the Northern District of California establishes an unfortunate precedent for the State of Montana in that it appears to permit Federal encroachment upon subject matters heretofore exclusively under the regulation, jurisdiction and control of public agencies of the State of Montana, to-wit: establishment of sanitary and quality regulations of milk and other food products.

CONCLUSION

It is submitted that the questions presented by the appeal of the instant case are important to state and federal relations not only of the State of California, but of the State of Montana, and call for a resolution by this Court.

Respectfully submitted,

FORREST H. ANDERSON,
Attorney General for the State of Montana.

GEOFFREY L. BRAZIER,
Special Ass't. Attorney General for the State of Montana.

Amicus Curiae

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IN THE

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vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,
Appellants.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF THE STATE OF MAINE AS AMICUS CURIAE

FRANK E. HANCOCK
Attorney General
of the State of Maine

THOMAS W. TAVENNER
Assistant Attorney General

IN THE

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October Term, 1961

No. ——

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Appellees,

vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,
Appellants.

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF OF THE STATE OF MAINE AS AMICUS CURIAE

The State of Maine is filing this brief as *amicus curiae* under the provisions of Rule 42 of the Rules of the Supreme Court of the United States. Consent to the filing of this brief is not needed under the provisions of Section 4 of said Rule 42.

INTEREST OF THE STATE OF MAINE

The legislature of the State of Maine enacted a Milk Control Law in 1935. This law is currently in effect and is Chapter 33 of the Revised Statutes of 1954 as

amended. This legislation is similar to that adopted by the State of California and gives to the Maine Milk Control Commission the general supervision over the price structure of the Maine dairy industry. The Maine Milk Commission has as its aim to insure an adequate supply of pure and wholesome milk to the people of the State at a reasonable price while at the same time affording a fair return over costs to both distributor and producer.

The problem existing in the State of California, and constituting the subject matter of the present action, is of great interest to the State of Maine. One of the objects of the Maine Milk Control Law, as above stated, is to insure milk producers an adequate profit on their investment. A dealer policy which returns to these producers less than fair value for milk to be consumed on Government instrumentalities would have the effect of undermining the pricing structure established to insure such fair return. It is essential, therefores that the Maine Milk Commission have the power to regulate the price paid by any dealer to any Maine producer. The adverse decision of the three judge District Court entered on April 18 and 19, 1961, against the State of California and reported in 190 F. Supp. 645, if sustained, could lead to the eventual undercutting of the milk price structure now in existence in the State of Maine.

It is in order to protect the Maine dairy industry and the citizens of the State of Maine that the Maine Milk Commission, by and through the Attorney General, is filing this brief as *amicus curiae* in support of the position taken by the State of California.

ARGUMENT

It is the position of the State of Maine that the opinion rendered by the three judge District Court and cited above was in error as conflicting with Congressional policy and various decisions of the Supreme Court of the United States. The State of Maine as

amicus curiae is in full and complete agreement with the arguments presented in the brief filed by the State of California in this action. For this reason, it is not deemed necessary that the State of Maine reiterate the arguments presented in the brief filed by the State of California.

CONCLUSION

The State of Maine submits that the position taken by the Appellant, State of California, should be sustained and that the issues presented are of great importance to the State of Maine and call for resolution by this Court.

Respectfully submitted,

FRANK E. HANCOCK
Attorney General
of the State of Maine

THOMAS W. TAVENNER
Assistant Attorney General

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

UNITED STATES OF AMERICA ..... Appellees

vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California, ... Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

AMICUS CURIAE BRIEF FOR THE STATE OF MISSISSIPPI

JOE T. PATTERSON, Attorney General of the State of Mississippi

JOHN L. HATCHER, Attorney for the Mississippi Milk Commission

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. _____

UNITED STATES OF AMERICA — Appellees

vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California, — Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

AMICUS CURIAE BRIEF FOR THE STATE OF MISSISSIPPI

I.

INTRODUCTORY STATEMENT

This Brief Amicus Curiae on the Jurisdictional Statement for this Cause is being submitted by the State of Mississippi, through its Attorney General, and the Mississippi Milk Commission, an agency and political subdivision of the State of Mississippi, pursuant to the provisions of Rule 42 of the Revised Rules of the U. S. Supreme Court. The State of Mississippi believes that

the determination of the legal questions involved in this case is of paramount concern to the citizens of the State of Mississippi and that to uphold the decision of the United States District Court for the Northern District of California would be contrary to the best interest of the citizens of this State. By virtue of Rule 42 (4), the consent of the United States, Appellee, to the filing of this brief is not required, and it is respectfully requested that this Court permit this brief to be filed in this Cause.

II.

THE QUESTIONS ARE SUBSTANTIAL

(1)

THE MILK COMMISSION ACT OF THE STATE OF MISSISSIPPI

On May 11, 1960, the Legislature of the State of Mississippi enacted the Milk Commission Act, the same being Sections 4560-141 through 4560-170, inclusive, Mississippi Code Annotated (1942), as amended, which created the Mississippi Milk Commission, composed of the Commissioner of Agriculture and Commerce of the State of Mississippi and six other members representing milk producers, distributors, retailers and consumers, for the purpose of carrying out the provisions of said Act and gave said Commission the power to supervise, investigate and regulate the fluid milk industry in the State of Mississippi. The Mississippi Milk Commission was given the power to fix minimum producer, wholesale, and retail prices throughout the State of Mississippi, and pursuant to said authority, the Commission has now divided the State of Mississippi into six marketing areas and has fixed minimum producer, wholesale, and retail prices within each of said marketing areas. Section 4560-155, Mississippi Code Annotated (1942),

as amended. Minimum prices are now fixed by the Mississippi Milk Commission on all milk sold within the entire State of Mississippi from the cow to the consumer.

By the adoption of the Milk Commission Act the Legislature of the State of Mississippi declared that it was the policy of this State "to promote, foster, and encourage the intelligent production and orderly marketing of fluid milk and cream; to eliminate speculation and waste, and to make the distribution thereof between the producer and consumer as efficient and economical as possible, and to stabilize the marketing of such commodities", and further that it was the purpose of the Act to eliminate certain unjust, unfair, destructive, and demoralizing trade practices being carried on in the production, transportation, processing, storage, distribution, and sale of milk, which trade practices constitute a constant menace to the health and welfare of the inhabitants of the State of Mississippi. Section 4560-141, Mississippi Code Annotated (1942), as amended.

(2)

THE REASONS FOR AND PURPOSES OF THE MILK COMMISSION ACT OF MISSISSIPPI

A review of some of the reasons for the adoption of the Milk Commission Act of the State of Mississippi, and the other milk stabilization laws of the various states, would be appropriate at this point. The question is sometimes asked as to why milk is so different from other products such as bread, meat and vegetables as to justify price regulations under the police power of the state. The characteristics of milk which distinguish it from other products are (1) its necessity, (2) its perishability, (3) the inability to regulate its supply at

the source, (4) the impracticability of its storage, (5) the financial condition of the dairy industry, and (6) its unique system of marketing. Some of these unique characteristics of milk can be easily recognized by its comparison with one of these other products, such as gasoline. Gasoline, though necessary, is not an essential item of diet, and small babies and growing children can do without it. Gasoline is not a perishable commodity and need not be delivered fresh daily, as in the case of milk. The supply of gasoline can be regulated at the source from day to day, but a cow must be milked twice daily or her production ceases permanently and not only the product is lost but her value deteriorates by irregular use. Gasoline can be stored for a reasonably long period of time when demand decreases and there is an oversupply, which is not true in the case of milk. The comparison could be extended to other products such as bread, meat and vegetables with substantially the same result.

Unlike the marketing system of other products, Grade A milk has long been marketed in such a way that the producer's income is dependent upon the utilization of his milk by the dealer or handler, over which he has no control. The producer is paid one price for milk utilized in products generally designated as Class I under federal and state milk pricing orders (or Grade A fluid milk products) and a substantially lower price for milk utilized in products generally designated as Class II under said orders (or manufactured milk products such as butter and cheese), which system of marketing existed long before any federal or state milk pricing orders came into existence in the various states. This system of marketing makes the milk producer particularly vulnerable to instability in the market at the wholesale and

retail level over which he has no control, but which vitally affects his financial return. For this reason it is absolutely essential from the producer's standpoint that minimum prices be fixed at both wholesale and retail, since instability in the market at the wholesale and retail level vitally affects his financial return. It is because of these unique characteristics of milk and its system of marketing that the dairy industry in the State of Mississippi can be destroyed by price manipulation at the wholesale and retail level in a relatively short period of time, and this distinguishes the dairy industry from other industries.

(3)

THE CONSTITUTIONALITY OF THE MILK COMMISSION ACT AND OTHER STATE MILK STABILIZATION LAWS

Recognizing these unique characteristics of milk and the reasons for the adoption of the Milk Commission Act, the Supreme Court of the State of Mississippi upheld the constitutionality of the Milk Commission Act of the State of Mississippi on April 24, 1961, in the Case of *Mississippi Milk Commission v. Vance Dairy, et al*, 129 So. 2d 642 (Miss. 1961). In this decision, the Supreme Court of Mississippi stated that milk is an indispensible food, and, in certain respects, its production, conservation and distribution are unique; that the milk industry is "affected with the public interest", and the police powers of the state may be exercised in the proper control and regulation of an industry affecting the public interest, even to the extent of fixing prices for milk in all stages and forms; and that the police powers may be exercised when necessary to regulate and provide for the safety, the health, the morals, the development of

industry the utilization of natural resources, and the general welfare of the State. Due to the fact that the Milk Commission Act and the decision of the Supreme Court of Mississippi upholding same are of recent origin, they were omitted from Appendix C of Appellant's Jurisdictional Statement filed in this cause; however, we would like to call the Court's attention to this statute and decision at this time.

From a review of the decisions of the Supreme Court of the United States, it will be seen that the highest Court in the land has directly upheld the constitutionality of the State Milk Stabilization Laws of New York, Pennsylvania and Virginia, and inferentially those of California, Indiana and Wisconsin, although certain aspects of some of these laws have been invalidated because of interference with inter-state commerce or for other reasons. *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469 (1934), *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259 (1934), *Borden's Farm Products Company v. Baldwin*, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), *Borden's Farm Products v. Ten Eyck*, 297 U.S. 251, 56 S.Ct. 453, 80 L.Ed. 469 (1936), *Baldwin v. Seelig*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032, 101 A.L.R. 55 (1935), *Milk Control Board of Pennsylvania, v. Eisenberg Farm Products*, 306 U.S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939), *Penn. Dairies, Inc., v. Milk Control Commission*, 318 U.S. 261, 63 S.Ct. 617, 87 L. Ed. 748 (1942), *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 57 S. Ct. 549, 81 L. Ed. 835 (1937), *Milk Control Board v. Crescent Creamery*, 305 U.S. 559, 59 S.Ct. 87, 83 L. Ed. 352, *State v. Marriott*, 314 U.S. 571, 62 S. Ct. 76, 86 L.Ed. 463, and *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761 (1943). These decisions of the Supreme Court

of the United States demonstrate that a state is authorized under its police power to adopt and enforce reasonable regulations for the economic control of the dairy industry of the state, and may delegate to an appropriate administrative agency the power to enforce such legislation and to supplement it with reasonable rules, regulations and orders designed to carry out the terms of the statutes, including the power to fix minimum and maximum prices to be paid for milk by producers, distributors, handlers and consumers.

(4)

THE PROBLEM OF SALES OF MILK TO THE FEDERAL GOVERNMENT AND ITS IMPACT UPON THE STATE OF MISSISSIPPI AND OTHER STATES

The immediate question to be determined in this case will vitally affect the application of milk pricing orders of the Mississippi Milk Commission to sales of milk by licensees of the Commission to military installations owned by the United States Government. First, the Mississippi Milk Commission would like to state that it does not intend nor is it attempting to assert jurisdiction over any military installation or any agency or instrumentality of the federal government, but that the Commission does and can assert jurisdiction over its own licensees as to the resale price which they charge to their customers. The Commission controls not only the price at which the licensee purchases milk but also the price at which said licensee sells milk to other customers, no matter who that customer may be, and the remedy provided for a violation of the orders of the Commission is directed solely against the licensee in the form of revocation or suspension of the license, or assessment of a penalty in lieu thereof.

Although the immediate question concerns only the sale of milk to military installations owned by the federal government, the decision herein rendered would have a very broad affect in that it would establish a principle which would be applicable to the sale of milk to all federal agencies and instrumentalities within the State of Mississippi and the other states of the union. When you consider not only the military installations, but also the Veterans Administration hospitals, Indian reservations, the U. S. Corps of Engineers, the concessions on national parks, and other federal agencies and instrumentalities within this state, this problem becomes one of paramount importance. A relatively large proportion of the volume of milk being sold in the State of Mississippi passes through these federal installations and unless these prices can be controlled by the Mississippi Milk Commission, serious damage would result not only to the processing plants and distributors within the state, but also to the producers, whose net income is determined by the utilization of milk at the wholesale and retail level.

A real danger to the effective enforcement of the Milk Commission Act of the State of Mississippi lies in the existing sales of milk by milk dealers to the United States at lower prices than the price required for all other sales. The route of milk from the producer to consumer is a continuous one, and the evil effect of sub-standard prices to the federal government flows backward to play its part in undermining the intelligent production and orderly marketing that the state has declared essential to the public health. A primary purpose of the Milk Commission Act is to insure a sufficient supply of wholesome milk to the consuming public and to insure an adequate return to the members of the dairy industry, which purposes cannot be accomplished unless the high

cost of maintaining sanitary standards and standards of purity at the dairy farm is returned to the producer. If the federal government is permitted to purchase milk at sub-standard prices, the immediate result will be a loss to the processing plants, distributors and producers in the State of Mississippi. This being true, the Mississippi Milk Commission, in discharging its obligation to both the dairy industry and all the inhabitants of the State of Mississippi, would inevitably be forced to eventually raise prices to the consumer in the State of Mississippi. No matter how you look at it, certain people within the State of Mississippi will be severely damaged or injured by the federal government procuring milk at sub-standard prices.

Approximately 70% of the fluid milk purchased by the United States on its military bases is sold by it through commissary stores, post exchanges and post restaurants to members of the Armed Forces, civilian federal employees residing on such bases, and their families. The remaining 30% is purchased for consumption at troop messes.

The federal defense agencies purchase milk both for consumption and for resale, with both appropriated and nonappropriated funds. Milk obtained for resale in post exchanges, post restaurants and officers' and service clubs is purchased with nonappropriated funds, that is, moneys which are derived from revolving funds established from the profits derived from the operation of these post exchanges, restaurants and clubs. Milk is purchased for resale through post commissaries from appropriated funds, with the sales price so adjusted as to furnish sufficient gross revenue to make reimbursement to the United States of the funds. The milk ob-

tained for consumption in troop messes is purchased from appropriated funds.

Post exchanges operated by the defense departments rank in dollar volume below only Sears, Roebuck & Co., J. C. Penney, Montgomery Ward and F. W. Woolworth, among retail chains. In fiscal 1959 the post exchange system made a profit of $60,000,000 on sales of $895,000,000. In addition, commissaries operated by the defense departments for fiscal 1959 did a $520,000,000 business. In both the post exchanges and the commissaries the retail sales prices are substantially below competitive private retail prices because purchasers pay no state or municipal sales taxes and because the post exchanges and commissaries pay no income taxes, have their stores built for them, spend little for advertising or promotion, and use commissioned officers in the armed forces to manage the enterprises.

This combination of freedom from local taxes, low overhead expenses, and intense competition between distributors willing to dispose of milk at by-product prices results in a resale price for fluid milk in post exchanges, service clubs and commissaries far below the comparable retail store price. To add injury, these commissaries often sell at a price below their own inventory price. It is little wonder that these commissaries sell such a tremendous volume of milk.

Also, under military regulations, the milk purchased at a commissary is supposed to be utilized solely by service personnel and certain designated civilian personnel. However, these regulations have never been enforced and it is quite common for a service man or designated civilian living within a community to purchase milk at the commissary in large quantities and return to the community and distribute same to the entire

neighborhood in which he lives. This creates instability and chaos within the entire city in which the military installation is located. This not only places the federal government in direct competition with private enterprise, which in itself is contrary to fundamental principles of law, but in addition gives this same federal government a tremendous price advantage in competition with such private enterprise.

The Hoover Commission found 199 commissaries in the United States doing $185,000,000.00 worth of business when it investigated those installations in 1954. In 1958, Defense Department Commissaries in the United States numbered 283, with an annual business volumn of $366,400,000.00. Pointing out that commissaries were originally established so that military personnel and specified civilian employees could obtain food stuff, "when such goods were not otherwise obtainable", the Commission's report said, "However, commissary operations have continually expanded to the extent that today (1954) they present a real problem of government competition with private enterprise in many metropolitan localities." Seven years after these words were written, the commissary problem, despite efforts of the Congress to provide a remedy, has increased by 42 percent in terms of numbers, and 98 percent in terms of volume. In terms of unfair, unnecessary and genuinely destructive competition, the problem has more than kept pace with the statistical growth.

To many fluid milk distributors, commissaries constitute the most devastating kind of competition. Although commissary service is limited theoretically to military and specified civilian personnel, in practice the no-limit rule on amount of purchases and the difficulty of screening the customers, makes a mockery of these

regulations. This situation, coupled with prices that run from 10 to 23 cents per gallon below street prices, creates a competitive force that is destroying some milk distributors and is bringing others dangerously close to the brink of financial bankruptcy. The commissaries on military installations in the United States, created originally as a kind of fringe benefit for the $30.00 a month soldier, have grown to the point where, in some communities, they are a major factor in the grocery business, and the roughest kind of competition.

There are three principal ways in which commissaries become competitors of established milk distributors and established grocery stores. In some communities where there is an extensive military installation, the commissary is the major grocery store. The second competitive point is the establishment of what amounts to a price standard. The commissary price is usually well known in a community. Customers ask, "Why, if the commissary price is 35 cents, do you charge 47 cents?" This gives the impression to the consumer that the dairy industry is profiteering and in many cases the retail milk business in a particular market has been seriously injured.

The third and most devastating kind of competition develops when merchandise goes into civilian channels. The rules on the operation of commissaries issued by the Defense Department are elaborate and extensive, and are contained in a book about the size of an encyclopedia.

The rule on persons eligible to be served states that the Commissary shall sell only to base personnel; however, visitors to the homes of base personnel are also included, as well as visiting and retired military personnel in the area. There is no limitation on the number or value of the purchases that each customer may make.

In some cases efforts are made to screen customers so that only those entitled to commissary service are allowed to use the store. Other commissaries do very little in this area. Actually, it makes little difference, because a person entitled to a commissary privilege can purchase for friends. As a result, either through direct purchase or through a friend making the purchase, commissary merchandise is not confined to base personnel, but gets into civilian channels in direct competition with established distributors.

The problem is a complex one. Commissaries were not created to make money. They are operated by government employees paid out of tax money, and their mark-up is supposed to cover shrinkage, and not operating costs. It is difficult to distinguish between those who have commissary privileges and those who do not have them, and, since there is no limit on purchases, such a distinction would not make a great deal of difference in any event. Thus, we find a serious situation where government stores maintained by tax money sell merchandise at ridiculously low prices in direct competition with stores and milk distributors who pay the taxes that keep the commissaries in business.

The concept of a commissary as a fringe benefit, while its value is debatable, certainly can be defended. But the commissary as a store supported by public funds in competition with established firms is something else again. Perhaps the strangest contradiction in this contradictory situation is the fact that Congress specifies year after year that no appropriation will be spent for the operation of commissaries in the United States unless the Secretary of Defense certifies that satisfactory items normally procured from such stores are not avail-

able within a reasonable distance from the base and at a fair price.

(5)

THE PROBLEM OF FEDERAL-STATE RELATIONSHIPS IN SIMILAR FIELDS OF ACTIVITY

Although this particular case involves the sale of milk to federal agencies, there are numerous related fields of State legislation which are recognized and required to be observed by federal agencies, in which cases the contractor must certify to the federal government that he has complied with certain state laws, such as minimum wage requirements, quality of construction, and various other matters which result in an increase in the price of product or service being furnished to the federal government. Government contractors can be required by the state to pay sales and use taxes upon materials used in a cost-plus fixed fee contract, *Alabama v. King & Boozer*, 314 U.S. 1, *Curry v. United States*, 314 U.S. 14, and to pay a nondiscriminatory advalorem tax on their possessory interest in government owned materials and equipment, *City of Detroit v. Murray Corp.*, 355 U.S. 489. The effect of these working and wage provisions and the impact of these taxes serve to increase the cost of goods and services purchased by the government. This being so, there is good reason for the respective states, acting to protect the public health, to require distributors selling milk to the United States to adhere to its minimum price requirements.

The contention of the Mississippi Milk Commission is in harmony with the recommendation of President Eisenhower's Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the State. This Committee, in its report stated:

"With respect to the large bulk of federally owned or operated real property in the several states and outside of the District of Columbia, it is desirable that the federal government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest and status only, with legislative jurisdiction remaining in the several states." Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Government Printing Office, Volume 1, 1956, page 70.

The United States is apparently contending that the United States has complete sovereignty over the territory involved and that the law of Mississippi or any other state as to such territory is as "foreign as is the law of China" (Mr. Justice Frankfurter dissenting, *Pacific Coast Dairy vs. Department of Agriculture*, supra). The effect of this contention would be to deprive the residents of such territory of the privileges of state citizenship. For example, this would affect the rights of residents of such areas to have their children educated in the public schools, to vote, to hold public office, to sue for divorce, or to have their persons, property or affairs subject to probate in the state courts. Similarly, a state could, if it chose to do so under this theory, deny such a resident the privileges granted only to state citizens, such as the right of employment by the state or local government, the right to receive a higher education at a state institution at a favorable tuition, the right to acquire hunting and fishing licenses at low cost, a right to receive visiting nursing service and care in county hospitals, and the right to receive the services of local departments of health. It is quite apparent that the residents on these federal installations would be will-

ing, and in fact, would demand, the acknowledgment of their "rights" of state citizenship but that these same persons are unwilling and refuse to accept the "responsibilities" of such citizenship.

(6)

THE LEGAL PRINCIPLES INVOLVED IN THIS CASE

The legal authorities hereinafter cited, in relation to this problem of sale of milk to federal agencies, usually deal with two principles or theories of law, which are as follows:

(1) The question of jurisdiction over the federal enclave—whether the federal or state government exercises exclusive jurisdiction or both of them exercise concurrent jurisdiction over this federal territory. Article I, Section 8, Clause 17 of the Constitution of the United States, in effect provides that land cannot be acquired by the federal government without the consent of the state, which means that the federal government acquires only such jurisdiction as is ceded to it by the state. The statutes of each particular state which were in effect at the time of the acquisition of the property concerning the cession of jurisdiction by the state are appropriate in determining this question.

(2) The supremacy clause of the United States Constitution, which states that statutes of the United States Congress shall be supreme and must prevail over any state law which conflicts therewith, Article VI, Clause 2, Constitution of the United States. If there is no conflict between the state milk control regulations and the applicable federal procurement act concerning this particular sale of milk, then the state regulation would stand since there is no conflict with the federal act.

The State of Mississippi concurs with the position taken by the State of California on both of the legal principles above named and believe same to be fully supported by competent legal authority, including previous decisions of the Supreme Court of the United States and particularly the case of *Penn-Dairies, Inc., et al v. Milk Control Commission*, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943). In that case this Court stated that in the absence of Congressional consent there is an implied constitutional immunity of the federal government from state taxation and from state regulation of the performance by federal officers and agencies of governmental functions, but that those who contract to furnish supplies and render services to the government are not such state agencies and do not perform governmental functions. The mere fact that non-discriminatory regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. The Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policies and that state regulations like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state borders.

To establish a conflict under the supremacy clause of the Constitution, the United States relied upon the Armed Forces Procurement Act which required competitive bidding in the purchase of supplies for the Army. The Supreme Court held that said statutes, being the federal statute and the state statute, are wholly consistent with

the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition". Since the Armed Forces Procurement Act eliminated the requirement of competitive bidding where it was "impracticable to secure competition", the Court held that there was no conflict under the supremacy clause.

Even if it were to be construed that the federal government had exclusive jurisdiction over the military or other federal installations, a violation of the orders of the Mississippi Milk Commission or the price fixing orders of any of the other states are made misdemeanors under state law, and the criminal laws of the State would be operative therein by virtue of the Assimilative Crimes Act, 18 U.S.C. 13, which provides as follows:

> "Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The effect of this statute is to make state criminal laws effective upon federal installations and the federal government thereby adopts the state laws as its own. Although this may be a matter of enforcement by federal officials, certainly it cannot be denied that a sale

of milk below the minimum prices set by the Mississippi Milk Commission, would be a violation of federal law and therefore any court would be bound to observe this federal law in any federal proceeding. At this point it should be again noted that the State of Mississippi would enforce the provisions of the Milk Commission Act against the licensee of the Commission, being the milk dealer or handler, and not the federal agency itself. Also, the Supreme Court of the United States has specifically held that the Armed Forces Procurement Act is not in conflict with state milk regulations. Therefore, a bid submitted by a milk dealer or handler to a federal agency at below the minimum prices fixed by the Milk Commission would not only be a violation of state law but would be a violation of federal law as well.

Previous enactments of the Assimilative Crimes Act specified a certain date therein which meant that state laws enacted after said date were not assimilated, and previous court decisions so held. The statute as enacted in 1948 omits the specification of any date which not only would adopt previous state laws but will authorize the federal courts to assimilate future state laws. In other words, the federal statute as now enacted makes offenses committed on such federal reservations the law of the place that would govern if the reservation had not been ceded to the United States.

III.

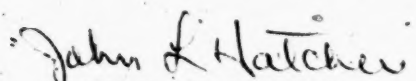
CONCLUSION

Therefore, the State of Mississippi concurs with the State of California as to the legal questions involved in this case, and it is respectfully requested that this Court give this matter its utmost and careful consideration as the decision in this case will have a profound

effect upon the dairy industry and the members of the consuming public within the State of Mississippi.

Respectfully submitted,

JOE T. PATTERSON
Attorney General of the
State of Mississippi

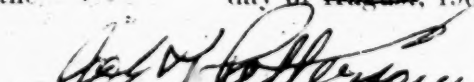


JOHN L. HATCHER
Attorney for the
Mississippi Milk Commission

CERTIFICATE OF SERVICE

The undersigned, as Attorney General for the State of Mississippi, do hereby certify that a true and correct copy of the foregoing amicus curiae brief on the jurisdictional statement was this day deposited by me in a United States Post Office or mail box, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D.C.

This the 7th day of ~~August~~ September, 1961.



Joe T. Patterson, Attorney
General for the State of
Mississippi

SUPREME COURT, U. S.

Office Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 28

UNITED STATES OF AMERICA, *Appellees*,
vs.
CHARLES PAUL, *Director of Agriculture of the State of California*, AND STANLEY MOSK, *Attorney General, State of California, Appellants*.

AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

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August 29, 1961.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

AMICUS CURIAE BRIEF

Under Rules 42.1 and 42.4, the State of Nevada files this Brief as Amicus Curiae, as follows:

INTEREST OF THE AMICUS CURIAE

The State of Nevada, Amicus Curiae herein, has an interest in the case in the following respects:

A. The Legislature of the State of Nevada has enacted legislation entitled "Stabilization and Marketing of Fluid Milk

and Fluid Cream" (Nevada Revised Statutes 584.325 through 584.690)[1]. Said legislation is patterned after and closely follows the provisions of the California milk stabilization act, which is directly in issue in the within cause of action on appeal to this Court (Appellants' Jurisdiction Statement, page 2, line 15).

B. There is pending in the second Judicial District Court of the State of Nevada, in and for the County of Washoe, an action entitled "STATE DAIRY COMMISSION, STATE OF NEVADA vs. CRESCENT CREAMERY, INC.", being No. 186636, in Department No. 1, in which the identical questions are at issue as in the within cause, with respect to the constitutionality of the provisions of the Nevada Statutes, as cited herein, when applied to sales of milk and dairy products to the Stead Air Force Base, Nevada.

STATEMENT

The opinion of the District Court for the Northern District of California, Southern Division, as reported in 190 Fed. Supp. 645, which was decided on March 27, 1961, and the Injunction and Order issued pursuant to said opinion on the 17th day of April, 1961, had their immediate effect in the application of the provisions of Nevada Revised Statutes, as cited, the Rules and Regulations passed pursuant thereto by the State Dairy Commission,[2] State of Nevada, and upon the prices, as promulgated by the State Dairy Commission, State of Nevada, on sales

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[1]Nevada Revised Statutes are attached hereto as Appendix A.

[2]Pertinent regulations of the State Dairy Commission are attached as Appendix B. The minimum wholesale prices for fluid milk and fluid cream sold to departments or agencies of the federal, state and local government, licensed hospitals, and accredited schools may be reduced not to exceed five percent (5%) below minimum wholesale price contained in the appropriate area schedules, providing that for payment within thirty (30) days an additional one percent (1%) may be allowed.

to Government military installations located within the confines of Nevada, as follows:

1. In bids for delivery of milk and dairy products to the Stead Air Force Base, for the period commencing July 1, 1961 through August 31, 1962, Nevada milk distributors were confronted with the situation that, while they were bound by the provisions of the Nevada milk stabilization act, and the promulgated prices as set by the Commission, California bidders were no longer bound by any such regulations or promulgated prices. The result was that, in order to compete and retain this milk business for the Nevada milk industry, these Nevada distributors were forced to ignore the aforesaid statutory and regulatory provisions, and submit bids lower than the promulgated price. All of which has resulted in a considerable loss to the dairy farmers of Nevada, and has resulted in defeating the intent and purposes of the Nevada statutory and regulatory enactments covering the sale of milk and dairy products.

2. Dairy farmers of Nevada whose milk is sold by distributors to the United States had been receiving $1.60 per pound of butterfat; since the District Court decision, returns to these same dairy farmers have dropped to a low of $1 per pound of butterfat. These returns are below the cost of production and threaten a dairy farm investment within Nevada of approximately $10,000,000. In the one instance cited of sales to the Stead base, the Nevada farmers will suffer a loss of $36,356.80, based upon the price bid as compared to the promulgated price, less all allowable discounts. The Nevada dairy industry is a small one as compared to that of other states and this amount is having and will have a very substantial detrimental effect upon the economic status of the industry.

3. Sales of milk and dairy products to Federal military

installations within the State of Nevada amount to five percent (5%) of the total milk production in Nevada.

4. Milk is currently being sold at the Stead Air Force Base, through its commissary, at 17 cents a quart. Whereas, the retail price per quart of milk sold in the grocery stores in the Reno area, adjacent to the Stead base, is 27 cents a quart. Retail grocery stores are therefore being discriminated against since the price that they pay for the milk at wholesale (e.g., 23.5 cents) is higher than the retail sales price at the commissary. These discriminations give to those entitled to purchase through the commissary an inequitable, unfair, and privileged purchasing status over other citizens of Nevada, and give this privileged class rights not enjoyed by the public generally, as stated on page 8, line 6 of Appellants' brief.

ARGUMENT

The District Court decision has already had a disruptive and devastating effect on the economy of the dairy industry in California and this paralysis has crept into Nevada. Twenty other states, which have milk control agencies, will eventually, to a greater or lesser degree, feel the results of the decision.

CONCLUSION

It is submitted that the questions at issue on this appeal are of sufficient magnitude for consideration by this Court, and require a hearing on the merits, with oral argument before the decision.

ROGER D. FOLEY
Attorney General of the State of Nevada

JACK P. F. GREMILLION
Attorney General of the State of Louisiana

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APPENDIX A

STABILIZATION AND MARKETING OF FLUID MILK AND FLUID CREAM

DEFINITIONS

584.325 Definitions. Unless the context otherwise requires, the definitions in NRS 584.330 to 584.385, inclusive, govern the construction of NRS 584.325 to 584.690, inclusive.

[18:387:1955]

584.330 "Commission" defined. "Commission" means the state dairy commission.

[20:387:1955]

584.335 "Consumer" defined. "Consumer" means any person who purchases fluid milk, fluid cream, or dairy products for consumption.

[30:387:1955]

584.340 "Dairy products" defined. "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

[23:387:1955]

584.345 "Distributor" defined.

1. "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk, fluid cream or any other dairy product for sale, including brokers, agents, copartnerships, cooperative corporations, and incorporated and unincorporated associations.

2. The definition of "distributor" shall not include any of the following:

(a) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream and does not purchase, or otherwise receive for resale, fluid milk, fluid cream or any other dairy product from sources outside the State of Nevada.

(b) Any establishment, where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream.

(c) Any person owned or controlled by one or more retail

stores or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises, which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream.

(d) Any producer who delivers fluid milk or fluid cream only to a distributor.

[25:387:1955]—(NRS A 1959, 894)

584.350 "Fluid cream" defined. "Fluid cream" means cream as defined in NRS 584.325 to 584.690, inclusive, and any combination of cream and milk, or any fluid product of milk or cream sold under any trade name whatsoever, which is not packaged in hermetically sealed containers and which contains more than 11.6 percent milk fat and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

[22:387:1955]

584.355 "Fluid milk" defined. "Fluid milk" means any and all whole or concentrated milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed.

[21:387:1955]

584.360 "Marketing area" defined. "Marketing area" is any area within this state declared to be such in the manner prescribed in NRS 584.325 to 584.690, inclusive.

[28:387:1955]

584.365 "Person" defined. "Person" means any individual, firm, corporation, association or any other business unit.

[31:387:1955]

584.370 "Producer" defined.

1. "Producer" means any person who produces fluid milk from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold.

2. "Producer" includes any association of producers.

[24:387:1955]

584.375 "Producer-distributor" defined.

1. "Producer-distributor" means any person who is both a producer and a distributor of fluid milk and fluid cream.

2. For the purposes of NRS 584.325 to 584.690, inclusive, a producer-distributor shall be deemed to be a producer in any transaction involving the delivery of fluid milk or fluid cream produced by him to a distributor and shall be deemed to be a distributor in any transaction involving the delivery of fluid milk or fluid cream to a person who is not a distributor as defined in NRS 584.345.

[26:387:1955]

584.380 "Retail store" defined. "Retail store" means any person owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

[27:387:1955]

584.385 "Stabilization and marketing plan" defined. "Stabilization and marketing plan" means any plan formulated and made effective by the commission within the legislative standards provided by NRS 584.325 to 584.690, inclusive.

[29:387:1955]

GENERAL PROVISIONS

584.390 Business affected with public interest; purpose of provisions. The production and distribution of fluid milk and of fluid cream is hereby declared to be a business affected with a public interest. The provisions of NRS 584.325 to 584.690, inclusive, are enacted in the exercise of police powers of this state for the purpose of protecting the health and welfare of the people of this state.

[12:387:1955]

584.395 Statements of fact and policy. The legislature declares that:

1. Fluid milk and fluid cream are necessary articles of food for human consumption.

2. The production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare.

3. The production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of Nevada is an industry affecting the public health and welfare.

4. It is the policy of this state to promote, foster and encourage intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices and improper accounting for milk purchased from producers.

[13: 387: 1955]

584.400 Necessity for marketing areas; administrative authority of commission. It is recognized by the legislature that conditions within the milk industry of this state are such that it is necessary to establish marketing areas wherein different regulations are necessary, and for that purpose the commission shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

[14: 387: 1955]

584.405 Legislative determination. The foregoing statements in NRS 584.390 to 584.400, inclusive, of facts, policy and application of NRS 584.325 to 584.690, inclusive, are hereby declared a matter of legislative determination.

[15: 387: 1955]

584.410 Purposes of NRS 584.325 to 584.690. The purposes of NRS 584.325 to 584.690, inclusive, are:

1. To provide funds for administration and enforcement of NRS 584.325 to 584.690, inclusive, by assessments to be paid by producers of fluid milk or fluid cream or both, and from licenses issued to distributors in the manner prescribed herein.

2. To authorize and enable the commission to prescribe marketing areas and to fix prices at which fluid milk or fluid cream, or both, may be sold by producers, distributors and retailers, which areas and prices are necessary due to varying factors of costs of production, health regulations, transportation and other factors in the marketing areas of this state; but the price of fluid milk or fluid cream within any marketing area shall be uniform for all purchasers of fluid milk or fluid cream of similar grade or quality under like terms and conditions.

3. To authorize and enable the commission to formulate stabilization and marketing plans subject to the limitations

herein prescribed with respect to the contents of such stabilization and marketing plans and declare such plans in effect for any marketing area.

4. To enable the dairy industry with the aid of the state to correct existing evils, develop and maintain satisfactory marketing conditions and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream.

[16:387:1955]—(NRS A 1959, 894)

584.415 Legislative intent: Construction.

1. It is the intent of the legislature that the powers conferred in NRS 584.325 to 584.690, inclusive, shall be liberally construed.

2. Nothing in NRS 584.325 to 584.690, inclusive, shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream.

3. The terms and conditions under which producers, distributors and retailers may sell, purchase and distribute fluid milk or fluid cream shall be established by the commission for the purpose of insuring an adequate and continuous supply of pure, fresh, wholesome fluid milk and fluid cream to consumers at fair and reasonable prices in the several localities and markets of the state and under the varying conditions of production and distribution.

[17:387:1955]—(NRS A 1959, 895)

STATE DAIRY COMMISSION

584.420 State dairy commission: Creation; number of members; appointment; chairman.

1. There is hereby created the state dairy commission of the State of Nevada in which shall be vested the administration of the provisions of NRS 584.325 to 584.690, inclusive.

2. The commission shall consist of nine members appointed by the governor. The members shall select a chairman from among their number.

[1:387:1955]—(NRS A 1957, 264)

584.425 Terms of members of commission. The members of the commission shall serve at the pleasure of the governor; but no appointment shall extend beyond a period of 4 years from the date of expiration of the preceding appointment.

[2:387:1955]

584.430 Qualifications of members. Two members of the commission shall be producers, two members shall be distributors and one member shall be a producer-distributor, two members shall be operators of retail stores and two members shall be persons representing the consuming public who have no connection with producers, distributors, producer-distributors, or the retail stores.

[4:387:1955]—(NRS A 1957, 264)

584.435 Grounds for removal of member. Continued absence from meetings of the commission may constitute good and sufficient cause for removal of a member by the governor.

[3:387:1955]

584.440 Meetings; quorum; rules and regulations.

1. The members of the commission shall meet at such times and at such places as shall be specified by the call of the chairman or a majority of the commission; but a meeting of the commission shall be held at least once every 3 months.

2. Five members of the commission shall constitute a quorum and such quorum may exercise all the power and authority conferred on the commission; but no rules or regulations shall be adopted, amended or rescinded except by a majority vote of the entire membership of the commission.

3. The commission shall prescribe reasonable rules and regulations for its own management and government and for the conduct of public hearings required by NRS 584.325 to 584.690, inclusive, and it shall have only such powers and duties as authorized by law.

[5:387:1955]—(NRS A 1957, 264)

584.445 Compensation of members; expenditure of funds by commission.

1. While engaged in official business, each member of the commission shall receive a salary of $10 per day and the per diem expense allowance and travel expenses as fixed by law.

2. The commission may expend in accordance with law all moneys now or hereafter made available for its use.

[7:387:1955]

584.450 Seal. The commission shall adopt a seal for its own use which shall have imprinted thereon the words "State Dairy Commission, State of Nevada." The secretary of the commission shall have the care and custody of the seal.

[11:387:1955]

584.455 Employees: Appointment; duties; salaries.

1. The commission, with the approval of the governor, may arrange and classify its work and may appoint such assistants, deputies, agents, experts and other employees as are necessary for the administration of NRS 584.325 to 584.690, inclusive; prescribe their duties and fix their salaries in accordance with classifications made by the state department of personnel.

2. All assistants, deputies, agents, experts and other employees shall be subject to the provisions of chapter 284 of NRS.

[6: 387: 1955]

584.460 Dairy commission fund: Source and expenditures. There is hereby created in the state treasury a special fund designated as the dairy commission fund. All moneys received by the commission pursuant to NRS 584.325 to 584.690, inclusive, shall be paid into the fund and shall be expended solely for the enforcement of NRS 584.325 to 584.690, inclusive.

[8: 387: 1955]

584.465 Records of income and disbursements. The commission shall keep a separate record of the classes and sources of income credited to the dairy commission fund and of the disbursements therefrom.

[9: 387: 1955]

584.470 Powers of commission: Hearings; oaths; witnesses. For the purposes of NRS 584.325 to 584.690, inclusive, the commission shall have power to hold hearings, administer oaths, certify to official acts, take depositions, issue subpenas and summon witnesses.

[10: 387: 1955]

CLASSES OF FLUID MILK

584.475 Classification of fluid milk. Fluid milk may be classified for the purposes of NRS 584.325 to 584.690, inclusive, as provided in NRS 584.475 to 584.490, inclusive.

[32: 387: 1955]

584.480 Classification of fluid milk: Class 1. Class 1 comprises any fluid milk or the cream therefrom that is supplied to consumers as market milk or market cream or concentrated milk or any combination of market milk and market cream, or any market milk which is not packaged in hermetically

sealed containers, or any other dairy product in which the use of market milk is required by the provisions of the laws of the State of Nevada, or any fluid milk or cream therefrom which is used in standardizing market milk.

[33: 387: 1955]

584.485 Classification of fluid milk: Class 2. Class 2 comprises such milk or the cream derived therefrom, as cream is defined in NRS 584.325 to 584.690, inclusive, as is sold or disposed of by distributors in any form not included in classes 1 or 3.

[34: 387: 1955]

584.590 Classification of fluid milk: Class 3. Class 3 comprises such milk or the cream derived therefrom, as cream is defined in NRS 584.325 to 584.690, inclusive, as is used by distributors in the manufacture of butter and cheese other than cottage cheese.

[35: 387: 1955]

GENERAL POWERS OF THE COMMISSION

584.495 Enforcement of provisions; rules and regulations. The commission shall enforce the provisions of NRS 584.325 to 584.690, inclusive, and any stabilization and marketing plan initiated pursuant to the provisions of NRS 584.325 to 584.690, inclusive, and for that purpose may make such rules and regulations as it shall deem necessary.

[36: 387: 1955]

584.500 State instrumentality. The commission is hereby declared to be the instrumentality of this state for the purpose of administering and enforcing the provisions of NRS 584.325 to 584.690, inclusive, and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority described in NRS 584.325 to 584.690, inclusive.

[37: 387: 1955]

584.505 Investigations; records of producers and distributors.

1. The commission may investigate, upon reasonable notice, any and all transactions between producers and distributors or among distributors or between distributors and retail stores or between distributors and consumers or between retail stores and consumers; and the commission or its authorized agents

may enter at all reasonable hours all places where milk is stored, bottled or manufactured, or where milk or milk products are bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and may inspect and copy any such books, papers, records or documents.

2. Each producer and distributor shall maintain adequate records concerning his transactions in fluid milk and fluid cream.

[38:387:1955]—(NRS A 1959, 895)

584.510 Licensing of distributors and registration of producers. The commission may issue licenses to distributors and require the registration of producers.

[39:387:1955]

584.515 Formulation of plan. The commission may formulate any stabilization and marketing plan as prescribed in NRS 584.325 to 584.690, inclusive, and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the commission affected by such plan.

[40:387:1955]

584.520 Amendment or termination of plan: Procedure.

1. The commission may amend or terminate any stabilization and marketing plan, after notice and public hearing as prescribed in NRS 584.550 to 584.565, inclusive, if it finds that such plan is no longer in conformity with the standards prescribed in, or will not tend to effectuate the purposes of, NRS 584.325 to 584.690, inclusive.

2. Such hearing may be held upon the motion of the commission and shall be held upon receipt of a petition signed by producers representing not less than 55 percent of the total number of all of the producers and not less than 55 percent of the total production of all producers who are eligible to petition the commission for the formulation of such plan.

3. Notwithstanding the provisions of subsections 1 and 2 of this section, if the producers wish to abandon an existing stabilization and marketing plan and establish a Federal Milk Marketing order or other similar type of milk marketing order, the commission may continue a marketing and stabilization plan in effect for any given area, insofar as wholesale and retail provisions are concerned, whenever it appears that 55

percent of the distributors in any given area, whose major interest in the fluid milk and fluid cream business consists of at least 55 percent of the fluid milk and fluid cream distributed within the area by volume, desire that the wholesale and retail provisions, including price regulations, be continued.

4. Notwithstanding the provisions of subsections 1, 2 and 3 of this section, areas which are nonproducing may terminate a stabilization and marketing plan insofar as it affects wholesale and retail prices providing that 55 percent of the licensed distributors delivering 55 percent of the products to such area wish to terminate such plan after notice and public hearing as prescribed in NRS 584.550 to 584.565, inclusive.

[41:387:1955]—(NRS A 1959, 895)

584.525 Records. A full and accurate record of business or acts performed or of testimony taken by the commission in pursuance of the provisions of NRS 584.325 to 584.690, inclusive, shall be kept and placed on file in the office of the commission.

[45:387:1955]

584.530 Review of orders; limitation of action. Any order of the commission hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

[46:387:1955]

584.535 Injunction against violation of law or order: Joinder of defendants.

1. The commission may bring an action to enjoin the violation or threatened violation of any provisions of NRS 584.325 to 584.690, inclusive, or of any order made pursuant to NRS 584.325 to 584.690, inclusive, in the district court in the county in which such violation occurs or is about to occur.

2. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence or place of business may be in several counties and the violations separate and distinct.

[47:387:1955]

584.540 Cooperation with other authorities; enforcement of plans. The commission may confer, enter into agreements, or otherwise arrange with the constituted authorities of this state, other states or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this state or as between this state and other states or the United States, and may exercise its powers hereunder to effectuate and enforce such plans.

[48:387:1955]

584.543 Assistance in enforcement by constables, sheriffs and police officers. Constables, police officers and sheriffs may render assistance to the commission, any member of the commission or any authorized representative of the commission, in the enforcement of the provisions of NRS 584.325 to 584.690, inclusive, upon request.

(Added to NRS by 1959, 901)

584.545 Disposition of money. All moneys received by the commission hereunder shall be paid monthly into the state treasury to the credit of the dairy commission fund.

[49:387:1955]

FORMATION AND ADOPTION OF STABILIZATION AND MARKETING PLANS

584.550 Designation of marketing areas; additional areas; modification or consolidation of areas.

1. The commission shall designate marketing areas which it deems necessary or advisable to effectuate the purposes of NRS 584.325 to 584.690, inclusive, and wherein it finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform.

2. The commission shall have the power to establish additional areas or to modify areas theretofore established when it deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of NRS 584.325 to 584.690, inclusive.

3. When the commission finds, after a public hearing in and for each particular marketing area under consideration for consolidation, that conditions of production and distribution are reasonably uniform in two or more such marketing areas wherein stabilization and marketing plans are in effect, it may

consolidate the area, provided that at the hearings more than 35 percent of the producers present who supply the areas proposed to be consolidated do not object to such consolidation.

[50: 387: 1955]

584.555 Hearing to determine whether producers desire fluid milk plan. The commission shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in the area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for the marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for the area; but if a petition is presented to the commission by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for the marketing area by all such producers, it shall not be necessary that such hearing be held.

[51: 387: 1955]

584.560 Hearing to determine whether producers desire fluid cream plan. The commission shall, prior to the formulation of a stabilization and marketing plan for fluid cream for any marketing area, conduct a public hearing in the area for the purpose of determining whether or not producers whose major interest in the fluid cream business is in the production of fluid milk for fluid cream for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid cream business is in the production of fluid milk for fluid cream for the marketing area, and who produce not less than 65 percent of the total volume of fluid milk for fluid cream produced for the marketing area by all such producers, desire that a stabilization and marketing plan for fluid cream be formulated for the area; but if a petition is presented to the commission by producers whose

major interest in the fluid cream business is in the production of fluid milk for fluid cream for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid cream business is in the production of fluid milk for fluid cream for the marketing area, and who produce not less than 65 percent of the total volume of fluid milk for fluid cream produced for the marketing area by all such producers, it shall not be necessary that such hearing be held.

[52: 387: 1955]

584.565 Formulation of plan: Notice; hearing; order declaring plan in effect.

1. If the commission finds that a stabilization and marketing plan is necessary to accomplish the purposes of NRS 584.325 to 584.690, inclusive, it shall formulate a stabilization and marketing plan for fluid milk or fluid cream or both for such area and issue a notice of public hearing upon the plan formulated to all producers and distributors of record with the commission who may be subject to the provisions of such plan.

2. The notice of hearing may be effected by mail or by publication for 5 successive days in a newspaper of general circulation in the area designated and shall specify the time and the place of such hearing, which shall not be held prior to 10 days from the mailing or from the final publication of such notice; but if no daily newspaper of general circulation is published in the area designated, publication of notice for 2 successive weeks in a weekly newspaper of general circulation in the area will be considered proper publication of notice.

3. At the hearing, interested persons shall be heard and records kept of the proceedings of such hearing for determination by the commission whether the plan proposed will accomplish the purposes of NRS 584.325 to 584.690, inclusive.

4. If, after public hearing, the commission determines that the proposed plan will tend to accomplish the purposes of NRS 584.325 to 584.690, inclusive, within the standards herein prescribed, it shall issue an order to all producers and distributors of record with the commission and subject to the provisions of such plan, declaring such plan in effect within 30 days from the date of such hearing.

[53: 387: 1955]

584.568 Minimum prices; discounts.

1. Each stabilization and marketing plan shall contain provisions fixing the price at which fluid milk and fluid cream may be sold by producers, distributors and retailers and regulating all discounts allowed by producers, distributors and retailers.

2. In determining the minimum prices to be paid by distributors to producers the commission shall consider, but not be limited to, the following factors:

(a) Cost of production.

(b) Reasonable return upon capital investment.

(c) Producer transportation costs.

(d) Cost of compliance with health regulations.

(e) Current and prospective supplies of fluid milk and fluid cream in relation to current and prospective demands for such fluid milk and fluid cream.

3. In determining the minimum prices to be paid by retailers to wholesalers and by consumers to retailers the commission shall consider, but not be limited to, the following factors:

(a) The quantities of fluid milk or fluid cream, or both, distributed in the marketing area covered by the stabilization and marketing plan.

(b) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(c) The cost of fluid milk or fluid cream, or both, to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to NRS 584.325 to 584.690, inclusive.

(d) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and delivering, as such costs are determined by impartial audits of the books and records, or surveys, or both, of all or such portion of the distributors and retail stores, respectively, of each type or class in such marketing area as are reasonably determined by the commission to be sufficiently representative to indicate the costs of all distributors and retail stores, respectively, in such marketing area.

(Added to NRS by 1959, 899)

584.570 Unfair practices; certain practices of distributors prohibited whether plan in effect or not.

1. No distributor may engage in any of the practices set forth in paragraphs (a) to (d), inclusive, of subsection 2 of this section, whether or not a stabilization and marketing plan is in effect in the area in which he carries on his business.

2. Each stabilization and marketing plan shall contain provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

(a) The payment, allowance or acceptance of secret rebates, secret refunds or unearned discounts by any person, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of any customer.

(c) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream of like quantity under like terms and conditions.

(d) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period, the quantity of such milk to be paid for as class 1 in pounds of milk or pounds of milk fat or gallons of milk, and the price to be paid for all milk received. The contract shall also state the date and method of payment for such fluid milk, which shall be that payment shall be made for approximately one-half of the milk delivered in any calendar month not later than the 1st day of the next following month and the remainder not later than the 15th day of the month, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with NRS 584.325 to 584.690, inclusive, and shall contain a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at the minimum price for fluid milk that is used for class 3, as that class is defined in NRS 584.490. A signed copy of such contract shall be filed by the distributor with the commission within 5 days from the date of its execution. The provisions of this subsection relating to dates of payment shall not apply to contracts for the purchase of fluid milk from nonprofit cooperative associations of producers.

[54:387:1955]—(NRS A 1957, 264; 1959, 896)

OPTIONAL PROVISIONS

584.575 Report to producer. Each stabilization and marketing plan may contain provisions whereby distributors shall report to each producer from whom fluid milk is secured, the volume of fluid milk received from such producer in pounds of milk, and the milk fat test of such milk, and the amount of fluid milk in milk fat pounds paid for in the several classes and the prices paid for the various classes for each month.

[55: 387: 1955]

584.577 Sale prices, discounts. (Added to NRS by 1957, 264; R 1959, 901)

584.580 Purchase of milk from noncomplying producers; limitation on production. No distributor subject to the provisions of any stabilization and marketing plan shall purchase milk from producers who cannot comply with the provisions of NRS 584.325 to 584.690, inclusive, in such plan. No such plan shall involve a limitation upon the production of fluid milk or fluid cream.

[56: 387: 1955]

UNFAIR TRADE PRACTICES AND INVESTIGATION OF MARKETING AND PRICING PRACTICES

584.583 Sales of butter, fresh dairy byproducts below cost by distributors, retailers.

1. No distributor or retailer may sell butter or fresh dairy byproducts below cost. "Fresh dairy byproducts" includes but is not limited to the following items: buttermilk, skim milk, chocolate drink, ice cream, ice milk mix, sherbet, sour cream, sour cream dressing and cottage cheese; and does not necessarily define the class of fluid milk or fluid cream which is used to make such products.

2. In determining cost in the case of a manufacturing distributor, the following factors shall be included, but cost shall not necessarily be limited to such factors:

(a) Cost of raw products based on actual cost or on current and prospective supplies of fluid milk and fluid cream in relation to current and prospective demands for such fluid milk and fluid cream.

(b) Cost of production.

(c) Reasonable return upon capital investment.

(d) Producer transportation costs.

(e) Cost of compliance with health regulations.

(f) Overhead cost of handling based on a percentage of overall plant and sales operating cost.

3. In determining cost in the case of a peddler-distributor or retailer, the following factors shall be included, but cost shall not necessarily be limited to such factors:

(a) Purchase price of product.

(b) Overhead cost for handling.

(c) Reasonable return upon capital investment.

4. Each manufacturing distributor shall file with the commission a statement of costs, listing separately the items set forth in subsection 2 of this section and any other applicable cost factors. Such statements shall be kept current by supplement under regulations promulgated by the commission. All such statements shall be kept confidential by the commission except when used in judicial proceedings or administrative proceedings under NRS 584.325 to 584.690, inclusive.

5. Each manufacturing distributor and each peddler-distributor shall file with the commission a list of wholesale, retail and distributor or dock prices. No such distributor shall sell at prices other than those contained in such list, except in the case of bids to departments or agencies of federal, state and local governments; but in no case shall the distributor sell below cost as provided in this section.

6. The commission or any agent of the commission may examine, at any reasonable time and place, the books and records of any manufacturing distributor or peddler-distributor relating to cost and prices.

(Added to NRS by 1959, 900)

584.[illegible]34 Distributors may meet competitive prices in sales of butter, fresh dairy byproducts; information to be filed with commission.

1. Nothing in NRS 584.583 shall be construed as permitting or authorizing the development of conditions of monopoly in production or distribution of butter or fresh dairy byproducts, and a distributor who meets in good faith a lawful competitive price shall not be subject to any penalty provided in NRS 584.325 to 584.690, inclusive, if he files with the commission information detailing the circumstances surrounding the lawful competitive price within 5 days of such occurrence. Such information shall include the name and address of the distributor, the name and address of the customer involved, the

competitive price met. the effective date of such price or condition, and the name and address of the competing distributor.

2. If such information is accompanied by a written statement, signed by the customer before a notary public or two competent witnesses, that such competitive price has been offered or made available to him, such statement shall constitute prima facie evidence that a distributor is meeting such competitive price or condition in good faith.

(Added to NRS by 1959, 901)

584.585 Additional duty and authority of commission: Unfair trade practices. Pursuant to the declaration and statement of facts, policy and purposes set forth in NRS 584.325 to 584.690, inclusive, the commission is hereby vested with the additional administrative duty and authority to prescribe unfair trade practices and investigate marketing and pricing practices within marketing areas for later legislative recommendation.

[57:387:1955]

584.590 Investigation of prices in marketing area: Notice; hearing; record.

1. In investigating prices in any marketing area the commission may first make an investigation in such marketing area to establish such facts as shall be necessary to permit it to carry out the intent of NRS 584.585 and 584.590 within the standards herein prescribed. In making such investigation, the commission may, upon notice, examine the books and records of distributors and the purchase of dairy products by retail stores in such marketing area and may hold one or more public hearings, take testimony and may subpena witnesses. All testimony received at such hearings shall be under oath.

2. Notice of any hearing held by the commission pursuant to NRS 584.585 and 584.590 shall be given by the commission to every distributor and retail store in such marketing area whose name appears upon the records of the commission or who files a request for the same with the commission, by mail or by publication. The notice of hearing may be effected by mail, or by publication for 5 successive days in a newspaper of general circulation in the area designated, and shall specify the time and place of such hearing, which shall not be held prior to 10 days from the mailing or from the final publication of such notice; but if no daily newspaper of general circulation

is published in the area designated, publication of notice for 2 successive weeks in a weekly newspaper of general circulation in the area will be considered proper publication of notice.

3. A record of any and all hearings held by the commission pursuant to NRS 584.585 and 584.590 shall be made and filed in the office of the commission and shall, at all times, be available to inspection by any interested person.

[58: 387: 1955]

DISTRIBUTORS: LICENSES, FEES AND BONDS

584.595 Necessity for license; application; form and contents; term; renewal.

1. No distributor may deal in fluid milk, fluid cream or any other dairy product without first having obtained a license from the commission.

2. The special licenses provided in this section are in addition to any and all licenses otherwise required by any law or ordinance of any county or municipality of this state or any law of this state.

3. Application for the licenses herein provided shall be made on forms prescribed by the commission, shall be accompanied by an application fee of $3, and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the commission may require. Such applicant shall satisfy the commission:

(a) Of the applicant's good faith, character and responsibility in seeking to carry on the business stated in the application.

(b) That the applicant has complied with all laws of the State of Nevada and regulations promulgated thereunder, regardless of whether the applicant is a local or out-of-state distributor.

4. Licenses shall be issued for a period of 12 months from the 1st day of each year or for the remainder of the calendar year from the date of issuance.

5. Application for renewal of a license for the following year by a licensee, together with the application fee of $3, shall be made prior to the expiration date of the license held, and if not so made, the applicant shall pay an additional sum equal to 100 percent of the application fee before such license shall be issued.

[59: 387: 1955]—(NRS A 1959, 897)

584.600 Bond: Amount; form and conditions; proceedings for enforcement.

1. Every distributor before purchasing any fluid milk or fluid cream from a producer must execute and deliver to the commission a surety bond in the minimum sum of $1,000 executed by the applicant as principal and by a surety company qualified and authorized to do business in this state as surety.

2. The bond shall be upon a form approved by the commission and shall be conditioned upon the payment in the manner required by NRS 584.325 to 584.690, inclusive, of all amounts due to producers for fluid milk and fluid cream purchased by such licensee or applicant during the license year. The bond shall be to the state in favor of every producer of fluid milk and fluid cream.

3. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by NRS 584.325 to 584.690, inclusive, the commission shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the commission. Thereupon, the commission shall bring an action on the bond on behalf of the producer-creditors.

4. Upon any action being commenced upon the bond, the commission may require the filing of a new bond and immediately upon a recovery in any action upon such bond, such distributor shall file a new bond, and upon failure to file the same within 10 days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor.

5. In the event that recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro rata among the producer-creditors.

[60:387:1955]

584.605 Amounts of bonds. The amount of the bond required by NRS 584.600 shall be based upon the highest daily average of fluid milk purchased by the distributor in any calendar month during the license year, measured in gallons as follows:

Less than 100 gallons	$1,000
100 but less than 200	2,000
200 but less than 300	3,000
300 but less than 400	4,000
400 but less than 500	5,000
500 but less than 1,000	6,000
1,000 but less than 2,000	8,000
2,000 but less than 3,000	10,000
3,000 but less than 4,000	15,000
4,000 but less than 5,000	20,000
5,000 or more	25,000

[61:387:1955]—(NRS A 1959, 897)

584.610 Increase of purchases. In the event that any distributor so increases his purchases of fluid milk during the license year that such purchases exceed the amount for which the distributor is bonded, the distributor shall within a reasonable time post an additional bond or bonds as may be required to comply with the provisions of NRS 584.595 to 584.645, inclusive.

[62:387:1955]

584.615 Licenses and bonds: Of whom required.

1. The licenses and bonds provided for in NRS 584.595 to 584.645, inclusive, shall be required for each distributor, and for the purposes of NRS 584.595 to 584.645, inclusive, each subsidiary milk plant or branch milk plant, whether under one ownership or not, shall be considered as an individual distributor.

2. No bond shall be required of a cooperative association of producers.

[63:387:1955]

584.620 "Milk plant" defined. For the purposes of NRS 584.595 to 584.645, inclusive, a milk plant shall be any place, structure or building where a distributor receives fluid milk or fluid cream and weighs or tests or standardizes or pasteurizes or homogenizes or separates or bottles or packages such fluid milk or fluid cream, except that the provisions hereof shall not apply to a place or structure or building used for the purpose of receiving, weighing or testing fluid milk or fluid cream which is to be diverted or delivered to the milk plant of the distributor receiving fluid milk or fluid cream,

which milk plant is licensed and bonded under the provisions of NRS 584.595 to 584.645, inclusive.

[64:387:1955]

584.625 Failure to execute and deliver bond or post additional bond. Failure of any distributor who purchases fluid milk or fluid cream from producers to execute and deliver the bond as herein provided and required shall constitute a violation of NRS 584.325 to 584.690, inclusive; failure of any such distributor to post such additional bond or bonds as may be required to comply with the provisions of NRS 584.325 to 584.690, inclusive, shall likewise constitute a violation of NRS 584.325 to 584.690, inclusive.

[65:387:1955]

584.630 Distributors' assessments on fluid milk, fluid cream.

1. Distributors who are subject to any stabilization and marketing plan as established by the commission shall pay to the commission on all milk fat contained in fluid milk, fluid cream or both, purchased from producers, including their own production, if any, a fee in cents per pound of milk fat equal to that required to be deducted from payments due producers of fluid milk under NRS 584.635.

2. Such assessed fees received by the commission shall be used in the administration and enforcement of NRS 584.325 to 584.690, inclusive.

3. Distributors who import dairy products into the State of Nevada that contain milk fat, which products or the milk fat content thereof have not been subject to assessment by the State of Nevada, shall be assessed at the same rate on the content of milk fat contained in such products as Nevada distributors are assessed on fluid milk or fluid cream which go into the manufacture of such type products.

[66:387:1955]—(NRS A 1959, 898)

584.633 Distributors' assessments on butter, fresh dairy byproducts.

1. The commission shall assess each distributor of butter the sum of one-half cent per pound on all butter distributed by such distributor.

2. The commission shall assess all distributors of fresh dairy byproducts the sum of 2 cents per gallon on all ice cream,

sherbet, or ice cream or ice milk mixes, and the sum of one-fourth cent per pound on all cottage cheese, distributed by such distributors.

3. Assessments under this section shall be paid to the commission on or before the 15th of the month following the month during which the butter or fresh dairy byproducts were distributed. Late payments shall be subject to the same penalty as that provided by subsection 4 of NRS 584.635.

(Added to NRS by 1959, 901)

584.635 Assessment of sellers to distributors; penalties for delinquent payments.

1. Distributors who are subject to the provisions of any stabilization and marketing plan made effective by NRS 584.325 to 584.690, inclusive, including distributors who import fluid milk or fluid cream from outside the state, whether such items are finished products or in bulk, shall deduct as an assessment from payments due their sellers, whether such sellers are producers or distributors, and whether within or without the state, for fluid milk, fluid cream or both, including each distributor's own production, the sum of one-half cent per pound milk fat on all milk fat contained in fluid milk, fluid cream or both, or in the case of distributors who do not purchase or receive fluid milk, in milk fat pounds, the sum of 1½ cents for each 10 gallons of fluid milk sold. Such assessment rates are maximum rates.

2. The commission may fix the rate of such assessment at a less amount, and may adjust the rate from time to time, whenever it finds that the cost of administering the provisions of NRS 584.325 to 584.690, inclusive, can be defrayed from revenues derived from such lower rates in combination with such sums as are provided by NRS 584.630.

3. The amount of the assessment so deducted shall be paid to the commission on or before the 15th of the month following the month during which such fluid milk or fluid cream was received.

4. If payments of assessments are not made on or before the 15th day of each month following the month during which the fluid milk or fluid cream was received or following the date upon which any other assessment falls due, the commission shall charge, as a penalty for such late payment, the amount of 1 percent per month of the total amount due and owing, but remaining unpaid.

[67:387:1955]—(NRS A 1959, 898)

584.640 Distributor purchasing from producer-distributor: When bond not required; notice to commission; record of purchases; reports.

1. No bond shall be required of any distributor who purchases fluid milk or fluid cream from a producer-distributor; provided:

(a) That the buyer at the time of obtaining possession or control of each delivery pays for the same in full in lawful money of the United States; and

(b) That the fluid milk or fluid cream is purchased in package form ready for human consumption and not in bulk form.

2. Any distributor before purchasing fluid milk or fluid cream on the terms stated in subsection 1 shall notify the commission of his intention to make such purchases, stating from whom and the average daily quantity of such purchases. Such distributor shall also keep a record of such purchases, showing dates of purchases, amounts of purchases, and the name or names of seller or sellers, and shall make such other and further reports to the commission as it may from time to time require.

[68: 387: 1955]

584.645 Provisions of NRS 584.595 to 584.640 inapplicable to retail stores. The provisions of NRS 584.595 to 584.640, inclusive, with respect to licenses shall not apply to retail stores as such stores are defined in NRS 584.380.

[69: 387: 1955]

REPORTS AND STATISTICS

584.650 Reports and records by distributors. Every distributor who purchases fluid milk or fluid cream from a producer shall make and keep for 1 year a correct record showing in detail the following with reference to the handling, sale or storage of such fluid milk or fluid cream:

1. The name and address of the producer.
2. The date the fluid milk or fluid cream was received.
3. The amount of fluid milk or fluid cream received.
4. The official butterfat test of the fluid milk or fluid cream if purchased on a butterfat basis.
5. The usage of the fluid milk or fluid cream.
6. Evidence of payment for the fluid milk or fluid cream purchased.

[70: 387: 1955]

584.635 Records and reports confidential. Any record or report made to the commission pursuant to the provisions of NRS 584.650 to 584.665, inclusive, shall be confidential and shall not be divulged except when necessary for the proper determination of any court proceedings or hearing before the commission.

[71:387:1955]

584.660 Biennial report to governor. The commission shall, within 30 days prior to each general session of the legislature, submit to the governor a full and true report of the transactions under NRS 584.325 to 584.690, inclusive, during the preceding biennium, including a complete statement of receipts and expenditures during such period, together with its legislative recommendations.

[72:387:1955]

584.665 Collection, dissemination of statistical and other data. In addition to the compilation of information pertaining to fluid milk and fluid cream from the reports required by NRS 584.325 to 584.690, inclusive, the commission shall collect, assemble, compile, and distribute statistical data relative to fluid milk, fluid cream, other milk and milk products, and such other information as may relate to the dairy industry and the provisions of NRS 584.325 to 584.690, inclusive.

[73:387:1955]

PENALTIES

584.670 Misdemeanors; revocation, suspension of license; civil penalties.

1. The violation of any provision of NRS 584.325 to 584.690, inclusive, or of any stabilization and marketing plan, including the price requirements of such plan, or of any of the unfair practice provisions set forth in such sections, is a misdemeanor, and also is ground for revocation or suspension of license in the manner set forth in NRS 584.325 to 584.690, inclusive.

2. Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer. Failure to make such payment is hereby declared to be ground for refusal, suspension or revocation of license in the manner set forth in NRS 584.325 to 584.690, inclusive.

3. In addition to, or in lieu of, any other penalty provided

by NRS 584.325 to 584.690, inclusive, the commission may impose, upon any person subject to any penalty under subsection 1 of this section, a penalty of $500 for each violation, to be recovered by the commission in a civil action in a court of competent jurisdiction. All sums recovered under this subsection shall be paid into the state treasury to the credit of the dairy commission fund and shall be expended solely for the enforcement of NRS 584.325 to 584.690, inclusive.

[74: 387: 1955]—(NRS A 1959, 899)

DISCIPLINARY PROCEEDINGS

584.675 Refusal, revocation or suspension of license.

1. The commission may refuse to grant any license herein provided and may revoke or suspend any such license as the case may require when it is satisfied that any applicant or licensee has violated any provision of NRS 584.325 to 584.690, inclusive; but no order shall be made refusing, revoking or suspending any license except after hearing upon at least 10 days' notice to the applicant or licensee.

2. The decision may include an order refusing, revoking or suspending the license applied for or held by the respondent, or fixing such other conditional and probationary orders as may be proper for the enforcement of NRS 584.325 to 584.690, inclusive.

3. After any decision, including any conditional or probationary orders, should respondent fail, refuse or neglect to comply with any such orders, the commission may suspend or revoke the license in accordance with the procedure provided in this section.

4. Previous violation by any applicant or by any person connected with the applicant of any provision of NRS 584.325 to 584.690, inclusive, shall be good and sufficient ground for denial, revocation or suspension of a license.

[75: 387: 1955]

584.680 Emergency cases: Shortening time for hearing; service of notice; place of hearing.

1. Whenever the commission is satisfied, either by investigation or after hearing, that a distributor is unable to pay for fluid milk or fluid cream purchased from producers and is further satisfied that to permit the distributor to continue

to purchase and receive fluid milk or fluid cream from producers would be likely to cause serious and irreparable loss to producer-creditors and other producers, then the commission within its discretion may thereupon and forthwith shorten the time for hearing and thereupon may issue an order to show cause why the license of the distributor should not be forthwith suspended or revoked; but the time of notice of the hearing shall in no event be less than 5 days.

2. At such hearing the distributor proceeded against shall be ordered to show cause why his or its license should not be suspended or revoked or continued under such conditions and provisions, if any, as the commission may consider just and proper and for the protection of the best interests of the producer-creditors and producers from whom the distributor has been and is receiving fluid milk or fluid cream.

3. Following such hearing, the decision of the commission shall become effective at its discretion.

4. The hearing, in the case of such emergency, may be called upon written notice, the notice to be served personally or by mail on the distributor involved, and may be held at the nearest office of the commission or at such place as may be most convenient in the discretion of the commission for the attendance of all parties involved.

[76:387:1955]

584.685 Judicial review.

1. Any decision of the commission in the absence of an appeal therefrom as herein provided shall become final 20 days after the date of notification or mailing thereof. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by any qualified attorney employed by it and designated by it for that purpose, or, at the commission's request, by the attorney general.

2. Within 20 days after the decision of the commission, any party aggrieved thereby may secure judicial review thereof by commencing an action in the district court of the county in which the aggrieved party resides. Upon filing of the appeal, the enforcement of the commission's order shall be stayed pending final disposition of the appeal.

3. If the order is affirmed, it shall become final and conclusive and the stay of enforcement shall be automatically

vacated. With its answer, the commission shall certify and file with the court all documents, papers and a transcript of all testimony taken in the matter, together with the commission's findings of fact and decision therein.

4. Upon the final determination of such judicial proceedings, the commission shall enter an order in accordance with such determination.

[77: 387: 1955]

CONSTRUCTION AND INTERPRETATION

584.690 Applicability to retail stores. NRS 584.325 to 584.685, inclusive, shall apply to retail stores in the following particulars only:

1. The examination by the commission of the purchase records of retail stores from distributors.

2. The unfair practices prohibited in NRS 584.570.

3. The provisions of any stabilization and marketing plan which includes retailers.

[78: 387: 1955]—(NRS A 1957, 264; 1959, 899)

APPENDIX B

The pertinent provisions of the Nevada State Dairy Commission Regulations, as amended, are as follows:

ARTICLE VI

PRICING AND COST

SECTION B DISTRIBUTORS

1. The minimum wholesale prices for fluid milk and fluid cream sold to departments or agencies of the federal, state and local government, licensed hospitals, and accredited schools may be reduced not to exceed five percent (5%) below minimum wholesale price contained in the appropriate area schedules, providing that for payment within thirty (30) days an additional one percent (1%) may be allowed; also,

a. The minimum prices for fluid milk and fluid cream sold to licensed rest homes or licensed day nurseries, limited to rest homes caring for five or more patients or day nurseries caring for ten or more children, may be the minimum wholesale price contained in the appropriate area schedules.

b. The above accounts may be billed on a monthly basis.

2. Distributors will file with the Commission by the 31st of January each year a list of peddler-distributors with whom business is done, containing the following information:

a. Name and address.

b. Marketing area and zone number served.

c. Location of place where products are delivered or picked up.

3. A distributor shall not sell to another distributor or peddler-distributor below cost.

4. Each manufacturing distributor and each peddler-distributor shall file with the Commission a list of wholesale, retail, and distributor or dock prices. No such distributor shall sell at prices other than those contained in such list, except in the case of bids to departments or agencies of the federal, state and local government, licensed hospitals, and accredited schools, but in no case shall the distributor sell below cost.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 239 / 7

UNITED STATES OF AMERICA,
Appellee,
vs.
CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California,
Appellants.

Appeal from the United States District Court for the Northern District of California, Southern Division.

AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC., IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

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UNITED STATES OF AMERICA,
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Appellants.

Appeal from the United States District Court for the Northern District of California, Southern Division.

AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC., IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

This *Amicus Curiae* brief is filed on behalf of the Consolidated Milk Producers of San Francisco, Inc., (hereinafter called Consolidated) in support of the jurisdictional statement filed in this action by appel-

lants. Pursuant to Rule 42 of the Revised Rules of the Supreme Court, consent for the filing of this brief has been granted by the Solicitor General of the United States and the Attorney General of the State of California, representing the parties to this action.

No useful purpose will be served by our restating the analysis and argument so effectively made in appellants' jurisdictional statement. This brief will be limited to a brief statement of the interest of Consolidated in the pending litigation and the reasons why the Supreme Court of the United States is urged to accept jurisdiction.

THE INTEREST OF CONSOLIDATED IN THE LITIGATION

Consolidated is a non-profit corporation representing nearly 300 independent milk producers located in Northern California. Approximately 10% of the output of Consolidated's members is distributed to processing cooperatives; the balance is sold to commercial processors. This is roughly in proportion to the statewide pattern of distribution of fluid milk. Members of Consolidated are responsible for approximately 10% of the total production of fluid milk in the state.

Since its inception the primary purpose of Consolidated has been to provide its members with a means by which, through democratically elected representatives, they can deal with problems of producing and marketing their products. The provisions of the California Milk Stabilization Act and orders

adopted pursuant to it are vitally important to independent milk producers in California and, therefore, are of serious concern to Consolidated.

Two basic economic facts which characterize milk production in California make clear the importance of the state's milk stabilization program to these producers: (1) a continued oversupply of fluid milk; and (2) the small size and unequal bargaining position of the independent producers in selling to processors. Such chaos existed in the 1930's that the very existence of the producers was imperiled. Recognizing this to be a matter of public concern and welfare, the California Milk Stabilization Act was adopted in 1935, pursuant to which the State Director of Agriculture established minimum prices for sale of milk by producers. In 1937 the Act was amended pursuant to which authority was extended to an exercise by the Director establishing minimum prices for sale of milk by distributors.

Through area marketing orders, prices have been established for three classes of milk. The prices for Class I milk, which is the type sold to consumers and includes milk sold to military installations involved in the present controversy, have been just sufficient to enable producers to meet their cost of production. However, generally speaking, the program has accomplished the purposes for which it was intended.

The effect of the District Court order from which appellants' appeal is taken has been to disrupt substantially the milk stabilization program, to the serious detriment of the independent producers. Since

issuance of this order (and prior to the issuance of the temporary partial stay by Justice Douglas), processors engaged in cut-throat competition in bidding for contracts for supplying milk to military installations. Because of the unequal bargaining position of the independent producers, they were required to absorb the burden of the price-cutting by agreeing to accept as the price for such milk what the processor realized on the bid price after deducting for the cost and profit of processing. The return to producers fell from the minimum price of $5.19 per hundred weight to as low as $2.75 per hundred weight. This resulted in their producing such milk at as much as $2.00 per hundred weight below their cost of production.

Six percent of the total state's production is distributed to these installations. This represents a significant portion of total production of Class I milk. There is no market-wide pooling of milk, and, consequently, the burden of producing substantially below cost for the military falls unequally with some producers distributing as much as 50% of their production to this outlet. This is a burden which the independent milk producer cannot endure for long.

Consequently, Consolidated has a profound interest in the pending litigation, an interest which is by no means limited to minimum producer prices but to the entire milk stabilization program, since independent producers in California long ago recognized that real stability can be obtained only by establishing minimum prices at the distributor levels as well.

ISSUES RAISED SHOULD BE RESOLVED BY THE SUPREME COURT

Appellants have stated that the questions presented by the appeal from the order of the District Court are as follows:

1. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which dairy farmers may sell and distributors may purchase milk conflicts with the Armed Services Procurement Act of 1947.

2. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which distributors may sell milk conflicts with the Armed Services Procurement Act of 1947.

3. Whether enforcement of the provisions of the California Milk Stabilization Act against distributors or dairy farmers whose milk is sold to the United States at three particular military installations is constitutional.

4. Whether the District Court erred in permanently enjoining enforcement of the California Milk Stabilization Act as unconstitutional without trial and on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073) where the pleadings and affidavits raised issues of material facts.

5. Whether the District Court erred in failing to abstain from final decision pending construction by

the California Supreme Court of the California Milk Stabilization Act and California statutes relating to the acquisition of land and jurisdiction by the United States, and in enjoining appellants from proceedings in pending state court actions.

We concur with this analysis and with the argument so effectively made by appellants in support of their contention that the questions raised are substantial.

We are particularly disturbed by the decision of the District Court in finding a conflict violative of the Supremacy Clause—U. S. Constitution, Art. VI, Cl. 2—between the California Milk Stabilization statute and the Congressional policy embodied in the Armed Services Procurement Act of 1947, 62 Stat. 21.

ARGUMENT

Throughout its history, this Court has exercised restraint in finding that the action of a state, resulting from legislation enacted by its duly elected representatives after consideration of the subject matter, is unconstitutional.

We are particularly disturbed by the District Court's decision that the California Milk Stabilization statute is void under the Supremacy Clause of the United States Constitution as being in conflict with Congressional policy embodied in the Armed Services Procurement Act of 1947, 62 Stat. 21.

The aim of the California statute is to insure the state's residents a safe and healthful supply of milk

by the elimination of destructive competition through industry-wide minimum price fixing; *In re Willing*, 12 Cal. 2d 591, 594 (1939). Such statute constitutes a valid exercise by the State of its police powers. *Nebbia v. New York*, 291 U.S. 502 (1934). And when a state exercises its police power to legislate for its citizens' welfare, it has long been settled that "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States even when it may do so, unless its purpose to effect that result is *clearly manifested*. This Court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the *repugnance* or *conflict* should be *direct* and *positive*, so that the two acts could not be reconciled or consistently stand together'. *Sinnot v. Davenport*, 22 How. 227, 243 . . ." [Emphasis added]; *Reid v. Colorado*, 187 U.S. 137, 148 (1902). That this policy of restraint must be adhered to if the states are not to be deprived of practically all power to enact laws for the health and welfare of their citizens is apparent from the infinite areas in which Congress now legislates; such a policy encourages state and local governments to perform their functions in the absence of a conflicting policy clearly and properly expressed by Congress. The District Court's decision is in direct conflict with this Court enunciated policy of restraint.

In *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943), this Court held a similar minimum

milk price act to be wholly consistent with federal statutes[1] requiring competitive bidding by contractors seeking to sell supplies to the Army. The present requirement for competitive bidding contained in the Armed Services Procurement Act of 1947[2] is no more

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[1]"They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it 'impracticable to secure competition' . . ." (pages 272, 273).

[2]Armed Services Procurement Act of 1947, 62 Stat. 21:

Section 2(c):

"(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: PROVIDED, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Con-

contrary to the minimum price regulations of Cali-

gress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: PROVIDED, That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in main-

taining active engineering, research and development, are otherwise subserved: PROVIDED, That beginning six months after the effective date of this Act, and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

(d) If in the opinion of the agency head bids received after advertising evidence any violation of the antitrust laws he shall refer such bids to the Attorney General for appropriate action.

(e) This section shall not be construed to (A) authorize the erection, repair or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 3, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), 12), or (15) or subsection (c) of this section.

SEC. 3. Whenever advertising is required—

(a) The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: PROVIDED, That all bids may be rejected when the agency head determines that it is in the public interest to do so.

SEC. 4.

(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant

fornia[2] than the competitive bid requirements considered in the *Penn Dairies* case [supra], were to the Pennsylvania price regulations.

The declared Congressional purpose of the Armed Services Procurement Act of 1947 was to eliminate abuses in government contracting and assure the government of "fair and reasonable prices."[3] To hold

to section 2 (e) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee."

[2]See Appellants' Jurisdictional Statement Brief, pp. 67-104.

[3]"This bill, as amended, provides for a *return* to normal purchasing procedures through the advertising bid method on the part of the armed services . . . it capitalizes on the lessons learned during wartime purchasing . . . A quote from the House report presents this concept of the bill and applies equally to the bill as amended . . .

> 'The bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies and services by the War and Navy Departments. It holds to the time-tested method of competitive bidding. At the same time, it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate *abuses*, assures the Government of *fair* and *reasonable prices* for supplies and services procured, and affords an equal opportunity to all suppliers to compete for and share in the Government's business . . .". [Emphasis added]
>
> 2 U.S. Code Congressional Service 1048, 80th Congress, Second Session, Senate Report No. 571.

that the California statute conflicts with Congressional policy is to hold that the State of California has imposed "unfair and unreasonable prices" upon its citizens for their daily milk. Indeed, in its analysis of section 2(c)(10)[4] of the aforesaid Procurement Act, the Senate Report reveals a definite intent *not* to void state price regulations—"The experiences of the war and contracts negotiated since the war in the fields of stevedoring, ship repairs, chartering of vessels, *where prices are set by law or regulation*, or where there is a single source of supply, have shown clearly that the competitive bid advertising method is not only frequently impracticable but does not always operate to the best interests of the Government. It is therefore intended that this section should be construed liberally and that the review of these contracts should be confined to the validity and legality of the action taken and should not extend to reversal of bona fide determinations of impracticability where any reasonable ground for such determination exists . . ." 2 U.S. Code Congressional Service 1048, 1055, 80th Congress, Second Session. Thus, no clear manifestations of direct and positive conflict would seem to exist between the California statute and the Armed Services Procurement Act of 1947.

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[4] "(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if— . . .

(10) for supplies or services for which it is impracticable to secure competition; . . ."

62 Stat. 21.

The *Penn Dairies* case [supra] also casts grave doubts upon the validity of the District Court's reliance on 32 Code of Federal Regulations, Sections 1.301, 1.56.1, 1.56.2, 3.210-3, 608.1 and 608.3, for its conclusion that a comprehensive procedure exists which conflicts with the California statute. These regulations were promulgated by the Secretary of Defense pursuant to authority conferred by 70A Stat. 120, sec. 2202.[5] Such statute reveals no delegation to the Secretary by congress to avoid state minimum price laws; without such delegation the Secretary's actions cannot suffice to create a conflict. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 276[6] (1943).

The District Court also erred in considering *Public Utilities Commission v. United States*, 355 U.S. 534 (1958), as determinative of the instant case. That case merely held that where the State allowed negotiated rates below the regular price schedule, the United States could not be required to submit its

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[5] "Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the need of the military departments without duplicate or overlapping operations or functions."

[6] "The statutes authorizing the Secretary . . . 'to prescribe rules and regulations to be observed in . . . submission . . . of bids . . . give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price . . .'"

negotiated contracts to the State agency for a determination of the contract's validity; the Court rationale turned on the delay and related problems of subjecting Federal shipments to State regulation. In the instant case, and contrary to the *Public Utilities* case [supra], the United States is nowhere mentioned in the California Milk Stabilization statute; but rather, the District Court relies on the usual catch-all clauses to find the United States being subjected to State penal regulation. This action by the District Court presumes the California Legislature used a butterfly net to go bear hunting; such hardly complies with the requirement that in the application of the principle of supremacy the conflict should be so direct and positive that the State and Federal acts cannot be reconciled. *Reid v. Colorado* [supra]. The District Court's decision fails to appl[y] the principle that in determining whether a statute conflicts, its entire scheme should be considered. *Savage v. Jones*, 225 U.S. 501, 533 (1911).

In addition, even assuming that the District Court was correct in concluding that a prohibition had been placed upon the Federal Government, only that portion of the statute would be unconstitutional. The California Legislature provided for a divisible statute even down to phrases:

> "(b) if any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this Code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section,

subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

California Agricultural Code, Section 4420; California Stats., 1955, C. 230, P. 697, Sec. 1.

Most difficult to understand is the basis upon which the District Court has interpreted Federal procurement policy to prevent a state from enforcing its minimum price laws to producers-distributor contracts. Such appears to be an unjustified extension of Federal supremacy. In *Alabama v. King & Boozer,* 314 U.S. 1, 8-9 (1941), it was held that "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity . . ." The same principle applies to producers. Even assuming the District Court correctly decided the Distributor-Government contract was freed from the California Act, no principle exists for immunizing the Producer-Distributor contract. If the Producer minimum price is a burden to the Federal Government, "it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct . . ." *Trinity Farm Co. v. Grosjean,* 291 U.S. 466, 472 (1933).

The District Court cites no supporting authority for its conclusion that the California statute is also void as applied to Producers. Even assuming as the Court appears to do, that the *Penn Dairies* case [supra] was overruled by the *Public Utilities* case [supra], an assumption we believe is wholly inaccurate, the Court at most could possibly proscribe the enforcement of minimum distributor prices; surely it cannot be argued that minimum *producer* prices place a "prohibition on the Federal Government" within the meaning of the *Public Utilities* case.

In placing special emphasis upon the foregoing arguments, we do not intend to minimize the importance or validity of other questions raised by appellants and arguments in support thereof.

CONCLUSION.

It is submitted, therefore, that Consolidated on behalf of its members and other milk producers has a profound interest in this appeal, that the Supreme Court of the United States has jurisdiction of the appeals, and that substantial questions are presented which warrant the Court to grant the appeals.

Dated, San Francisco, California,
September 21, 1961.

Respectfully submitted,
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SUPREME COURT, U. S.

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IN THE

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OCTOBER TERM, 1961

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vs.

UNITED STATES OF AMERICA,

Appellee.

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Brief of Dairy Institute of California, Milk Industry Foundation, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, General Dairy Industry Committee of Southern California, as Amici Curiae in Support of Appellants' Jurisdictional Statement.

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Brief Filed With Consent of Parties.

All parties to the case have given their written consent to the filing of this brief. Such consents have been filed with the Court concurrently with the filing of the brief.

Interest of Amici Curiae.

Dairy Institute of California, Milk Industry Foundation, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, and General Dairy Industry Committee of Southern California are all nonprofit trade associations, the membership of each of which is composed of persons engaged in the business of processing and distributing fluid milk and other dairy products.[1]

All members of Dairy Institute of California, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, and General Dairy Industry Committee of Southern California, and all members of Milk Industry Foundation doing business in California, are subject to the California Milk Stabilization Act.[2] All such members, as well as members of Milk Industry Foundation with offices outside California, are eligible to, and many of such members do, sell fluid milk and dairy products to agencies of the United States Government. All *amici* and their

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[1]Members of Dairy Institute of California process and distribute a substantial portion of all fluid milk and dairy products processed and distributed throughout the State of California. Members of Milk Industry Foundation (1145 - 19th Street, N.W., Washington, D. C.) operate throughout the United States and in some foreign countries. Members of Alameda County Milk Dealers Association, San Francisco Milk Council and Santa Clara County Milk Dealers Association have principal offices in the Northern California area in which the present case originated. Members of Dairymens Service Association have principal offices in Southern California in San Bernardino and Riverside Counties. Members of General Dairy Industry Committee have principal offices in the Southern California area.

[2]California Agricultural Code, Sections 4200 *et seq.*

members, therefore, have an important economic interest in the determination of the question presented by the case, and regard the decision of the United States District Court below as having an extremely adverse impact upon the right of the State of California, and of states generally, to deal effectively through legislation with the stabilization of the economy of the dairy industry.

ARGUMENT.

Both the Minimum Producer and the Minimum Wholesale Pricing Provisions of the California Milk Stabilization Act Apply in Their Entirety to Sales of Fluid Milk to Federal Agencies Upon Land Over Which the State of California Retains Jurisdiction.

The California Milk Stabilization Act is an important exercise of the State police power, applied to achieve stability for the past twenty-four years in the State's second largest industry. Such stability is accomplished through establishment by the Director of Agriculture of minimum prices to be paid by distributors to producers for fluid milk and of minimum prices for sales of processed fluid milk by distributors at wholesale and retail. The present case presents the question of the application of the minimum producer and minimum wholesale pricing provisions of the Act to sales of fluid milk to agencies of the Federal Government upon land over which the State of California asserts jurisdiction.

The essential purpose of a milk stabilization act is defeated by exceptions to the act.

"Prescribed minimum prices fail of their purpose if they lie in the shadow of cut prices."[3]

Six per cent of total fluid milk sales in the State of California are made to agencies of the Federal Government.[4] An exemption of this consequence from the provisions of the Milk Stabilization Act will lead inevitably to losses to both fluid milk distributors and producers, the undermining of sanitary regulations and the impairment of public health, the prevention of all such consequences being the purpose of the Milk Stabilization Act.[5]

The California courts in construing the Milk Stabilization Act have expressly recognized that its purpose is defeated by exceptions. For example, the courts have rejected the attempt by cooperative associations of producers acting as distributors to secure exemption from the provisions of the Act specifying minimum returns by distributors to producers.[6]

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[3]*Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818, p. 822 (1942) (Rev'd on other grounds, 318 U. S. 285 (1943)).

[4]R. 324, 419.

[5]"A price below a fixed minimum for milk produced in the state endangers those established standards for the milk industry that safeguard the public health and lead successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk production and generally injurious effects on the public health." (*Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818, 826 (1942)) (rev'd on other grounds, 318 U. S. 285 (1943)).

[6]"Petitioners . . . point out that a cooperative, from the very nature of its organization, cannot return the price fixed by the 'Director' for milk, if its net returns are less than such price; that in cooperatives, the producer-member is the owner, and that he receives the profits from its marketing activities, and should therefore bear any loss. It must be assumed that the foregoing effect upon cooperative organizations must have been foreseen by

In addition to its application without exception to the dairy industry *the California Milk Stabilization Act requires the concurrent existence of both its minimum producer pricing provisions and its minimum wholesale pricing provisions.* The Director of Agriculture has no authority to separate the two types of pricing provisions but instead is required to establish minimum wholesale prices in marketing areas where minimum producer prices are established.[7] Where minimum producer prices are terminated in a marketing area minimum wholesale prices are forthwith terminated.[8] Further, from a practical economic standpoint experience in the administration of the Act demonstrates that minimum producer pricing cannot be effectively enforced in respect to sales of fluid milk to federal agencies without state regulation of minimum wholesale pricing for such sales.[9]

The California Milk Stabilization Act must therefore, by its stated purposes and requirements, be en

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the Legislature, but that they considered that the health and general welfare of the people as a whole were paramount over such matters as the internal management of such associations, and their customary method of operation. *The print of a legislative intent to make the Milk Control Act all-inclusive is so apparent and strong that considerations of the force and nature we have now before it.*" *United Milk Producers v. Cecil*, 42 Cal. App. 2d 748, p. 760 (1941). (Emphasis supplied.)

[7]California Agricultural Code, Section 4351.5

[8]California Agricultural Code, Section 4351.5

[9]Enforcement by the Director of Agriculture, against cooperative associations of producers acting as distributors, of minimum producer returns from federal sales has not as yet been achieved in any litigation, whether instituted by the Director before or after the partial stay of injunctions ordered in the present case on July 3, 1941 (*Cal., Ware v. Milk Producers Assn.*, Stanislaus County Superior Court No. 19395 [R. 921]; *Paul v. Allied Dairymen, Inc.*, Tulare County Superior Court No. 50335).

forced in its entirety by the Director of Agriculture —both as to minimum producer and minimum wholesale pricing provisions—in respect to sales of fluid milk to agencies of the Federal Government upon land over which the State of California has jurisdiction.

The decision of the District Court below was that such application of the Milk Stabilization Act is prevented because of conflict between the Act and the Armed Services Procurement Act of 1947.[10] This contention was disposed of almost twenty years ago adversely to the United States in *Penn Dairies, Inc. v. Milk Control Commission*.[11] The requirements of the present Armed Services Procurement Act in respect to competitive bidding are not in any material way different from similar provisions in force at the time of the *Penn Dairies* case. In fact the enactment of the Armed Services Procurement Act in its present form, after the *Penn Dairies* decision, without any express statutory provision declaring state price fixing regulations inapplicable to fluid milk purchased by federal agencies, furnishes a persuasive reason for concluding today, as at the time of the *Penn. Dairies* case, that such laws as the California Milk Stabilization Act are not considered by the United States Congress as an interference with a federal function.

The District Court below erred in concluding that the California Milk Stabilization Act contains different provisions from the Pennsylvania Milk Control Law (before this Court in the *Penn Dairies* case) in respect to its application to federal procurement officers

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[10] 10 U. S. C. Par. 2301, *et seq.*

[11] 318 U. S. 261 (1943).

as purchasers of milk. As in the *Penn Dairies* situation the State of California does not assert that its Milk Stabilization Act places federal procurement officers under criminal jeopardy, and the Act has been so construed by the California Supreme Court.[12] The applicable provisions of the California Milk Stabilization Act do not differ in this regard from the provisions of the Pennsylvania Milk Control Law at the time the latter came before the United States Supreme Court for decision in the *Penn Dairies* case.[13]

Where minimum producer prices for fluid milk are established under federal marketing orders such prices are enforced in sales of fluid milk to the Federal Government notwithstanding the competitive bid requirements of the Armed Services Procurement Act and notwithstanding the possibility of a price increase to Federal agencies.[14] There can be no distinction in

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[12] *Pacific Coast Dairy v. Department of Agriculture*, 19 Cal 2d 818, 830 (rev'd on other grounds, 318 U. S. 285 (1943)).

[13] California Agricultural Code, Section 4504; Pennsylvania Act of April 28, 1937 (Pa. Stats., Title 31, Sec. 700 j-103 (defining "milk dealer" as "any person who *purchases or receives or handles* . . . milk") , and j-807 (providing for criminal penalties against "milk dealers") (emphasis supplied).

[14] *Knudsen Brothers Dairy, Inc. v. Benson* (U. S. D. C. Conn., Civil Action 8145, 1960) (case on appeal on other grounds under title of *Knudsen Brothers Dairy, Inc. v. Freeman*, Court of Appeals, Second Circuit, No. 26098) ("The plaintiff advances the argument that the payment order conflicts with the policy of competitive bidding utilized by the armed forces in procurement programs and should therefore be invalidated. It is true that the assessment may cause a partially regulated handler of outside milk to submit a higher bid figure as a result of the assessment. * * * Any increase in price which may indirectly result to the government in the purchase of milk supplies can therefore be justified since the requirement for payments to the fund insures a supply of quality milk in sufficient quantities which otherwise might be endangered due to the economic forces peculiar to this industry").

legal theory or in practical effect between the minimum producer pricing provisions of federal marketing orders applicable to fluid milk, and the California minimum producer and minimum wholesale pricing provisions applicable to fluid milk in an area where there are no federal marketing orders.

From an economic standpoint compliance with either California minimum producer prices or minimum wholesale prices will affect the ultimate price of fluid milk to federal agencies.[15] However, it is the specific point of the *Penn Dairies* case that state milk stabilization statutes are enforceable against persons selling milk to federal agencies on land over which the State has jurisdiction notwithstanding any possible effect of such regulations on prices charged federal agencies by fluid milk distributors. In this connection it is important for the Court to consider that 70% of the total volume of fluid milk purchased in California by federal agencies is purchased for resale through government-in-business retail stores known as commissaries. These stores are intended to be self-supporting; and may be operated by private persons;[16] and are in competition with privately owned retail stores. Only 30% of the total volume of fluid milk purchased is purchased with appropriated moneys for troop issue.[17]

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[15]The United States and the District Court below drew no distinction between the economic effect on federal milk purchases of California's minimum producer pricing regulations and of minimum wholesale pricing regulations. [Original Record, pp. 11, 670-672.]

[16]10 U. S. C., §2482.

[17]R. 814, 816, 817.

Amici urge, therefore, that the decision of the District Court below is directly contrary to the decision in the *Penn Dairies* case in holding that the application of the California Milk Stabilization Act (with its minimum producer and minimum wholesale pricing provisions) to sales of fluid milk to federal agencies conflicts with the Armed Services Procurement Act where such sales are made on land where the State of California has jurisdiction.

The issue of the jurisdiction of the State of California over the federal areas involved in the present case is fully presented at pages 14 through 24 of appellants' jurisdictional statement. *Amici* fully concur with such presentation. It is submitted that the District Court below erroneously determined that the United States had complied with applicable state law requirements necessary to obtain jurisdiction over the land areas involved in this case, such determination having been made without a trial and without affording opportunity to California courts to decide the meaning of California laws[18] and despite the circumstance that the California Milk Stabilization Act had been law in California for several years prior to acquisition by the Federal Government of the parcels of land involved in the case.[19]

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[18] [illegible] Court No. 2880 [illegible] filing Code No. [illegible] of California [illegible] fornia [illegible] Stat. [illegible]

[19] *Paige Cowlitz Corp. v. Hagerman*, 328 U. S. 285, 294; Jurisdictional Stmt., pp. 13-14.

Conclusion.

It is submitted that appellants' jurisdictional statement presents substantial questions requiring decision by this Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF PETALUMA COOPERATIVE CREAMERY IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

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AMICUS CURIAE BRIEF OF PETALUMA COOPERATIVE CREAMERY IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT.

BRIEF FILED WITH CONSENT OF PARTIES

All parties to this case have consented to the filing of this brief. Their written consents are filed concurrently herewith.

INTEREST OF AMICUS CURIAE

Petaluma Cooperative Creamery is a nonprofit cooperative association, organized in corporate form under California Agricultural Code Sections 1190 et seq. It was founded in 1913. Its members are 275 independent milk producers who own and operate dairy farms in North Coastal California. Each of them, and their cooperative entity, are "small business concerns" within the meaning of Section 2(b) of the Armed Services Procurement Act of 1947 (62 Statutes 21, 10 U.S.C. 2301 et seq.). An interpretation of the Armed Services Procurement Act is directly involved in this case.

The members of Petaluma Cooperative Creamery (hereinafter referred to as "Petaluma Co-op") own dairy farms in Marin, Sonoma, Napa, Lake and Mendocino Counties in California. Among them and through their cooperative entity (Petaluma Co-op, Amicus), they produce 20 million gallons of fluid milk each year. This is approximately one-fortieth of the entire annual fluid milk production of California. Petaluma Co-op's and its members' production area is one of the major milksheds in the United States.

The 20-million gallon output of its members is entirely shipped to Petaluma Co-op. Approximately

60% of this milk is resold to other milk distributors. Under the California Milk Stabilization Act (Sections 4200 to 4420, inclusive, California Agricultural Code), Petaluma Co-op, as a producer, receives a producer price for this milk, as established for its marketing area by the Director of the California Department of Agriculture (Section 4246, *Ibid.*).

Thus, Petaluma Co-op, as a cooperative association, is a milk producer under the California Act. It is also a distributor ("Producer-distributor", Section 4217, *Ibid.*). As a distributor, Petaluma Co-op sells approximately 40%, the balance, of its producers' annual 20-million-gallon milk output to retail stores and consumers. Under the California Act, it receives, for the milk in this category, the minimum wholesale or retail price established by the Director (Sections 4350 et seq., *Ibid.*). These prices are based, *inter alia*, upon Petaluma Co-op's production and handling costs as a distributor (Section 4355 [d] and [e], *Ibid.*).

The price received by Petaluma Co-op for its milk depends upon the classification—i.e., usage—of the milk sold (Sections 4225 to 4231, *Ibid.*). Its most favorable price is that for Class One milk defined in Section 4225 (*Ibid.*). The price recovered for milk it sells as a producer will vary with usage. The milk it sells as a distributor is all in a Class One usage. Petaluma Co-op recovers a Class One price for all of it, returning to its producer members the Class One producer price for that milk. In this category, Petaluma Co-op formerly bid on milk contracts for Federal military installations. Its bid was the Class One

wholesale price it was entitled to recover for the Class One usage involved, less a quantity discount permitted by State law and by the Director.

Under the instant injunction, the low-bid price collectible by Petaluma Co-op in military business cannot be the discounted Class One wholesale price to which it is entitled under the California Act. Against the sole alternative of selling below cost, the military market is no longer economically feasible to Petaluma Co-op. Nor is it legally feasible. The injunction itself is under a stay as to the minimum *producer* pricing provisions of the State law. Petaluma Co-op, therefore, is in a wholly anomalous position. The Federal Court has prohibited its recovery of a State-controlled price in the military market. The State law, however, still obligates it to pay to its producer members a State-controlled price for the same milk.

Petaluma Co-op has therefore been compelled to withdraw from the military bidding market. The direct result has been a reduction in its gross revenue amounting to approximately $14,000.00 each month, or $170,000.00 annually. This sum is vital to Petaluma Co-op's operating margin as a cooperative association and to its 275 farmer members.

ARGUMENT

ISSUES RAISED SHOULD BE RESOLVED BY THE SUPREME COURT

Appellants have stated that the current appeal from the District Court's order presents these questions:

1. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which dairy farmers may sell and distributors may purchase milk conflicts with the Armed Services Procurement Act of 1947.

2. Whether enforcement of the provisions of the California Milk Stabilization Act authorizing the establishment by the State Director of Agriculture of minimum prices at which distributors may sell milk conflicts with the Armed Services Procurement Act of 1947.

3. Whether enforcement of the provisions of the California Milk Stabilization Act against distributors or dairy farmers whose milk is sold to the United States at three particular military installations is constitutional.

4. Whether the District Court erred in permanently enjoining enforcement of the California Milk Stabilization Act as unconstitutional without trial and on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073) where the pleadings and affidavits raised issues of material facts.

5. Whether the District Court erred in failing to abstain from final decision pending construction by

the California Supreme Court of the California Milk Stabilization Act and California statutes relating to the acquisition of land and jurisdiction by the United States, and in enjoining appellants from proceedings in pending state Court actions.

Petaluma Co-op, as Amicus, concurs with this analysis and adopts it. Amicus likewise concurs with, and adopts, appellants' argument in support of their contention that these are substantial questions.

AN EXCEPTION OF A PORTION OF THE MILK BUSINESS DEFEATS THE PURPOSE OF THE STATE LAW

The California Milk Stabilization Act is an important exercise of California's police power over one of its largest industries. Its purpose is *stabilization*. A substantial portion of California's milk production is sold to the United States. The District Court's injunction herein excepts this business from the Act. The exception, or any exception, defeats the purpose of California's legislation, frustrates her police power, and invokes all the intolerable consequences which preceded the act and whose elimination is among its stated purposes. The California Act describes such consequences thus:

> "It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare; and that the production, transportation,

processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchase from producers."[1]

AN EXCEPTION AS TO A PORTION OF THE STATE LAW ITSELF DEFEATS ITS PURPOSE

Petaluma Co-op previously stated (supra, page 4) its difficulties under the present injunction in this case, which prohibits enforcement of the California Milk Stabilization Act in sales to the United States

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[1]Section 4201, California Agricultural Code

as to wholesale pricing, but not as to producer pricing. A major point before the Court is whether the California Act can or should be so enforced in part only. It cannot and should not. Its text, its context and its effect require the concurrent enforcement of its minimum producer pricing provisions and its minimum wholesale pricing provisions.

Under the California Act, the Director of Agriculture has no authority to separate these categorical provisions. To the contrary, he is required to treat them together. Specifically, he is required to establish ("designate and prescribe") minimum wholesale prices in marketing areas where minimum producer prices are in effect, and to terminate them where minimum producer prices are terminated.[2] Half an Act is no act at all.

THE STATE LAW DOES NOT CONFLICT WITH FEDERAL LAW

The District Court in this case ruled against enforcement of the California Milk Stabilization Act upon the ground that it conflicted with the Armed Services Procurement Act of 1947 (62 Statutes 21, 10 U.S.C. 2301 et seq.). The stated ground for this view, in the District Court's Memorandum Opinion herein, was that the California Act "places a prohibition on the Federal Government" within the meaning of this Court's—the Supreme Court's—decision in *Public Utilities Commission of California v. United*

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[2]Section 4351, California Agricultural Code

States.[3] The District Court undertakes to distinguish the case of *Penn Dairies v. Milk Control Commission,*[4] in which this Court had previously reached an opposite conclusion. The distinction is not well taken. In *Penn Dairies*, this Court permitted enforcement of the Pennsylvania Milk Control Law, in military milk buying, upon the express ground (318 U.S. at page 270) that:

> "(It) imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, *without incurring any penalty.*" (Emphasis added.)

Federal procurement officers who buy milk in California may function "without incurring any penalty." The State of California does not claim that its Milk Stabilization Act places these Federal officers in criminal jeopardy. The Supreme Court of California (in *Pacific Coast Dairy v. Department of Agriculture,* 19 Cal. (2d) 818, 123 P. (2d) 442, reversed on other grounds, 318 U.S. 285 (1943)) said (19 Cal. (2d) at page 830):

> "The California Milk Control Act does not discriminate against the United States army nor substantially hinder its efficient operation . . . *The act regulates not the army but the distributors who are independent contractors with the federal government.* It is settled that such contractors are subject to State control, and that any consequent burden on the federal government is

[3] 355 U.S. 534 (1958)
[4] 318 U.S. 261 (1942)

speculative and remote (Citations)." (Emphasis added.)

With reference to sanctions to which Federal procurement officers are exposed, the California Milk Stabilization Act does not materially differ from the Pennsylvania Milk Control Law which was before this Court in the *Penn Dairies* case. The Armed Services Procurement Act was enacted by the Congress after the *Penn Dairies* decision. It does not exempt Federal buying from State milk control laws. If such laws interfere with a Federal function, the fact has obviously not occurred to the Congress.

Petaluma Co-op concurs with appellants' argument on the issue of California's jurisdiction over the Federal enclaves involved in this case (pages 14-24, Appellants' Jurisdictional Statement). Where a State has such jurisdiction, the *Penn Dairies* decision is clear authority for the State's collateral contention that it can enforce its milk control laws against persons selling milk to Federal agencies. The District Court's decision herein is in direct conflict with the *Penn Dairies* decision.

It conflicts, further, with the law on the same factual situation where a Federal marketing order is involved. The provisions of such order are enforced in sales of milk to Federal agencies (*Knudsen Brothers Dairy, Inc. v. Benson,* U.S.D.C. Conn., Civil Action 8145 (1960) (on appeal on other grounds, *Knudsen Brothers Dairy, Inc. v. Freeman;* Court of Appeals, Second Circuit, No. 26698)). In *Knudsen,* the District Court specifically disallowed the argu-

ment that enforcement of an assessment order conflicted with the competitive-bidding aspect of Federal procurement programs—and inevitably increased Federal costs. The same reasoning should apply in the instant case.

CONCLUSION

Petaluma Co-op, Amicus, submits that appellants' Jurisdictional Statement presents substantial questions requiring decision by this Court.

Dated, Santa Rosa, California,
November 14, 1961.

Respectfully submitted,
JOSEPH A. RATTIGAN,
Attorney for Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 239

CHARLES PAUL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA, AND STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO JURISDICTIONAL STATEMENT

These two consolidated actions were instituted by the United States in the District Court for the Northern District of California to restrain the appellants, the Director of Agriculture and the Attorney General of the State of California, from enforcing California's minimum milk price regulations with respect to milk purchased by distributors from producers (*i.e.*, dairy farmers) and then sold by the distributors in fluid form or as milk products to the United States for mess hall consumption or resale at base commissaries

at three federal military installations[1] located within the territorial limits of California. The purchases by the United States from the distributors were made under contracts entered into by Army and Air Force procurement officers following competitive bidding, as required by armed service procurement regulations and procedures promulgated under 10 U.S.C. 2301, *et seq.* The case was heard by a three-judge court because it involved the constitutionality of the California Milk Stabilization Act as applied to the sales from the producers to the distributors and the subsequent resales to the United States.

In pertinent part, the California statute, enacted in 1935, requires that the State Director of Agriculture prescribe minimum prices at which distributors may purchase milk from producers (Cal. Ag. Code, Sections 4246, 4247, 4281) and at which the distributors can resell to wholesalers and retailers (Cal. Ag. Code, Sections 4351, 4352, 4353). Under Section 4410 of the Code, any person who violates any provision of the Act or any order of the Director is guilty of a misdemeanor and is subject to a civil penalty. See also Section 4361.

Prior to December 1959,[2] milk was purchased by distributors and resold to the United States at Travis,

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[1] Travis Air Force Base (Travis), Castle Air Force Base (Castle), and Oakland Army Terminal (Oakland).

[2] In 1943 California attempted to apply its Milk Act to sales made upon federal enclaves. The statute as thus applied was held unconstitutional. *Pacific Coast Dairy, Inc* v. *Department of Agriculture*, 318 U.S. 285; *Consolidated Milk Producers* v. *Parker*, 19 Cal. 2d 815, 123 P. 2d 440.

Castle and Oakland at prices below the minimum prices prescribed by the Director of Agriculture for such sales (R. 14, 30, 119, 149–151, 193, 227, 993). In early 1960 appellants filed actions in various state courts seeking injunctive relief and civil penalties against the milk producers and distributors who were involved (J.S. 5). Appellants also instituted declaratory judgment actions in the District Court for the Northern District of California against federal procurement officers at Travis, seeking a determination of the State's right to enforce the minimum price regulations with respect to sales consummated at that installation (J.S. App. 31).

The United States then brought these actions to enjoin appellants from attempting to enforce the California Milk Stabilization Act with respect to milk sold to these three bases.[3] The government contended that the Supremacy Clause of the Constitution precluded application of the California Milk Act to the purchase of such milk either by the distributor or by the government in view of the federal competitive bidding policy and procedures expressed in 10 U.S.C. 2301, *et seq.*, and in the Armed Forces Procurement Regulations, paras. 1–301, 1–302.2, 3–101 and 3–801.1, and in Army Procurement Procedure, para. 3–101. It was further argued that the minimum milk prices established by the Director of Agriculture could not be applied to purchases made for the three federal installations be-

[3] Suits involving Camp Pendleton and Mather Air Force Base await the disposition of this action (J.S. App. 30).

cause the sales were consummated on lands under the exclusive jurisdiction of the federal government.

After an extensive review of the applicable facts and statutes, the district court held in a memorandum opinion, dated November 29, 1960, that the California Milk Stabilization Act could not be applied to these purchases because they were made on lands under exclusive federal control, and because the Milk Act had not been assimilated as federal law. It also held that the State price regulations were unconstitutional on the ground that they conflicted with the expressed federal policy of competitive bidding, and because the statute imposed penalties on the federal government if it purchased milk at less than the established minimums.

On April 17, 1961, the district court entered final orders enjoining appellants from enforcing against producers and distributors of milk, and against the United States, the state minimum producer price, wholesale price, or retail price regulations with respect to purchases for Castle, Travis, and Oakland. On July 3, 1961, a Justice of this Court stayed the parts of the injunctions which enjoined appellants from enforcing against producers or distributors of milk the minimum producer price regulations promulgated by the Director of Agriculture for resale by the distributors to the three bases.[4]

Since the Jurisdictional Statement was filed, the federal government has reviewed its policy with respect to California milk regulation in procuring milk

[4] The government did not oppose the motion for a partial stay of the district court injunction.

and milk products for military installations. The case now stands in a new and different posture which, we believe, permits a summary disposition.

I

There is no longer any necessity for the Court to consider whether appellants can constitutionally enforce the established California minimum *producer* prices with respect to milk farmers selling to distributors for processing and ultimate resale to the United States. The federal government, while not conceding that California can regulate producer prices, over the objection of the federal government, where the milk is to be resold to the United States, has concluded as a matter of procurement policy not to assert immunity from these minimum prices but to accede to full compliance with those requirements. Accordingly, the United States now suggests that, without further briefing or argument, the Court remand the cause to the district court for a deletion of that part of the final order enjoining enforcement of the minimum producer price regulations as to milk sold to distributors for resale to the federal government.

II

The United States continues, however, to oppose any attempt by California to regulate the price at which *distributors* may sell milk or milk products to the military installations involved. In our view, the district court was clearly correct in enjoining enforcement of the minimum distributor prices because the sales between the distributors and the United States

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are consummated on territories under exclusive federal jurisdiction; so far as we are aware, all of these distributor sales take place on the federal enclaves. As to this aspect of the case, we submit, therefore, that the judgment below should be summarily affirmed.[5]

In *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, this Court held that California could not constitutionally apply its minimum distributor price restrictions to purchases made by the United States on lands under exclusive federal jurisdiction. The California Supreme Court has also ruled that the Milk Act is inapplicable to transactions concluded on federal enclaves. *Consolidated Milk Producers* v. *Parker*, 19 Cal. 2d 815, 123 P. 2d 440. These holdings rest, of course, upon the established principle that a State cannot regulate conduct on lands over which the United States has acquired exclusive legislative jurisdiction under Article I, Section 8, Clause 17 of the Constitution. See, *e.g.*, *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U.S. 525; *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439; *United States* v. *Unzeuta*, 281 U.S. 138; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Standard Oil Co.* v. *California*, 291 U.S. 242; *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518.

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[5] In the event that probable jurisdiction is nevertheless noted, the federal government will also argue that the California Milk Act is unconstitutional insofar as it compulsorily applies to distributor sales to the federal government because it prohibits, on threat of criminal and civil penalties, federal procurement officers from purchasing milk at less than the state-established minimums under the Armed Services Procurement Act and regulations issued thereunder. See *Public Utilities Commission of California* v. *United States*, 355 U.S. 534.

Appellants argue, however, that *Pacific Coast Dairy* is inapplicable because the lands on which the sales are consummated at Oakland, Castle and Travis are not under exclusive federal jurisdiction. This contention was thoroughly considered by the district court which, on the basis of exhaustive findings, concluded that the United States has acquired exclusive jurisdiction over the portions of these bases on which the sales are made. This conclusion is, we think, not open to serious challenge. Moreover, appellants' contentions with respect to it turn in large part upon the construction of various provisions of California statutes which, *ex hypothesi*, have only local application. There is no need for review by this Court.

A. TRAVIS AIR FORCE BASE

The United States can acquire exclusive jurisdiction over lands located in a State either by purchasing the land with the consent of the State (United States Constitution, Art. I, Sec. 8, Cl. 17)[6] or by a cession of such jurisdiction by the State. The latter method was first recognized in 1885 in *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U.S. 525. See,

[6] Article I, Section 8, Clause 17, provides that the Congress shall have power

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—

generally, *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518.

In 1942–1943, the United States acquired the Travis areas, upon which sales and deliveries of milk are made, by the purchase-with-consent method. J.S. App. 41; R. 127, 991, 993, 1062. At that time, California had one statute, enacted in 1872, which consented to the acquisition of exclusive jurisdiction by the United States pursuant to the Constitution, Art. I, Sec. 8, Cl. 17,[7] and a separate statute ceding exclusive jurisdiction to the United States over all lands "which may hereafter be ceded or conveyed" to the United States.[8] The latter statute was enacted in 1897,[9] shortly after the decision in the *Fort Leavenworth* case recognizing the validity of such a cession, *supra*. See J.S. App. 38–40.

Although appellants recognize that the federal government acquired Travis by the purchase-with-consent method, they contend that the United States did

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[7] Section 34 of the Cal. Pol. C. provided in pertinent part:

> The legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of erecting forts * * *.

[8] Chapter 56 of Cal. Stats. 1897 provided in pertinent part:

> The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: *provided* that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated * * *.

[9] The State first enacted a statute concerning the cession of jurisdiction in 1891. (J.S. App. 40.)

not thereby acquire exclusive jurisdiction over that installation because the federal government admittedly did not comply with the proviso of the 1897 *cession* statute that the state will not "cede" exclusive jurisdiction over lands "ceded or conveyed" to the United States unless the United States files a description and map of the lands with the county recorder. However, the plain language of the cession statute, as well as its legislative history, discloses that that statute only applies to lands "ceded or conveyed" to the federal government. The United States, in order to acquire exclusive jurisdiction by the separate purchase-with-consent method, does not have to comply with the provisions of the cession statute. The California Attorney General has previously recognized this clear distinction in Report of the California Attorney General, *Jurisdiction Over Federal Enclaves in California, 1958*, 3, 42, 72–73, and in 23 Ops. Cal. Attorney General 14.

James v. *Dravo Contracting Co.*, 302 U.S. 134, 143, upon which appellants rely for the proposition that a cession statute may qualify a separate consent statute, is wholly inapposite. *James* did not involve, as here, two separate statutes enacted at different dates to provide for different modes of transferring exclusive jurisdiction to the federal government. Instead, *one* section of the West Virginia Code, in succeeding paragraphs, gave the state's consent to the purchase of land by the United States, permitted municipalities to give land to the United States, and then ceded concurrent jurisdiction "over any land so acquired." As the Court found, the third paragraph, by specifi-

cally referring to "any land so acquired" by the United States, manifestly was intended to condition the transfers described in the first two paragraphs of the same section. 302 U.S. at 145.

B. OAKLAND ARMY TERMINAL

Appellants' argument that the United States did not acquire exclusive jurisdiction over Oakland when it purchased those lands in 1950 with the consent of California (J.S. App. 35) is closely akin to the statutory contention it makes with respect to Travis.

By 1950, Section 126 of the California Government Code had replaced Section 34 of the Political Code, *supra,* p. 8. Section 126 provides in pertinent part:

> Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law; * * *."

The various express reservations are described at J.S. App. 35–37. Also, the 1891 and 1897 cession statutes had been codified into Sections 113 and 114 of the Government Code (J.S. App. 40). Section 113 provided in pertinent part:

> The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States * * *.

Appellants do not deny that the United States acquired Oakland by the purchase-with-consent method nor that it complied with the express conditions of Section 126. They assert, however, that the State's consent was also subject, under Section 126, "to any other conditions or reservations prescribed by law," and that Section 126 thereby incorporated by reference the provision of Section 113 that the State "reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States." Appellants then contend that the "reserv[ation of] the administration of the criminal law of the State" in the cession statute was a reservation of the State's criminal jurisdiction over such lands and, therefore, that the State thereby reserved the right to enforce the penal provisions of the Milk Act.

As we have shown, *supra*, pp. 8, 10–11, Section 113 is a cession statute and its provisions, by its own terms, only apply to lands "ceded or conveyed" to the United States. They do not apply to lands, such as Oakland, which were purchased with the consent of the State and are within the express mandate of Article I, Section 8, Clause 17 of the Constitution. Furthermore, the phrase "the administration of the criminal laws" appeared in the original cession statute, Cal. Stats. 1891, ch. 181, p. 262, and has been interpreted to mean that the State reserves only the right to serve criminal process, and not as a general retention of criminal jurisdiction. *United States* v. *Watkins*, 22 F. 2d 437, 438–439 (N.D. Cal.).

C. CASTLE AIR FORCE BASE

The only area at Castle on which sales of milk are presently consummated is an 18-acre tract of land denoted as Tract A (J.S. App. 43; R. 191, 231). This area was originally acquired by the United States in 1942 pursuant to the Lanham Act, 54 Stat. 1125, 42 U.S.C. 1521, *et seq.*, for emergency civilian housing. Section 10 of the Lanham Act provided that the United States could not acquire exclusive jurisdiction over property acquired pursuant to that Act. Tract A, however, was transferred to the War Department later that same year,[10] and in 1943 the War Department obtained a deed to the property and fulfilled the requirements of the California consent-to-purchase statute (J.S. App. 44–46).

Appellants insist that the provision of Section 10 of the Lanham Act preventing the United States from acquiring exclusive jurisdiction over property purchased under that Act permanently "attached" to Tract A so that, even though it was subsequently purchased by the United States with the consent of California and for the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution, the United States did not acquire exclusive jurisdiction over the

[10] This transfer of jurisdiction was made pursuant to Section 4 of the Lanham Act, 56 Stat. 12:

> *Provided further*, That the Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of this Act as may be considered to be permanently useful to the Army.

tract. The court below correctly disposed of this footless argument (J.S. App. 46):

> We are of the opinion, however, that after the transfer of Tract A from the National Housing Administrator to the War Department, pursuant to 42 U.S.C.A. Section 1524, for military purposes, statutory provisions of the Lanham Act, including Section 10, became inapplicable to the land. The War Department would not be subject to statutory provisions pertinent only to lands held by the National Housing Agency for Lanham Act purposes. Upon its acquisition of Tract A for its own military purposes the War Department held it subject only to statutes pertinent to its own powers and purposes.[11]

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[11] Appellants also argue alternatively that the Milk Act was assimilated as federal law on Oakland, Castle and Travis because these installations were acquired after the enactment of the Milk Act, citing *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294. However, because a State cannot legislate with respect to a federal enclave unless it specifically reserved that right when it transferred jurisdiction to the United States, only the local law as it existed at the time of the acquisition is assimilated, and not subsequent amendments to that law. *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99–100. Appellants do not seek to enforce the Milk Act and regulations as they existed in 1943 (the date of the acquisition of exclusive jurisdiction over Travis and Castle) nor in 1950 (Oakland), but desire to impose the present price regulations.

Moreover, it is our position that the Milk Act is inconsistent with the federal policy of purchasing on a competitive basis—insofar as sales directly to the government are concerned—and therefore was never assimilated as federal law. Additionally, the federal government has enacted, in the Armed Services Procurement Act and Regulations, a comprehensive scheme governing procurement of milk on these enclaves and, since the federal gov-

CONCLUSION

For the reasons stated, it is submitted that the judgment below should be affirmed, except insofar as it enjoins enforcement of the California regulations pertaining to the minimum prices at which milk may be sold by producers to distributors. The cause should be remanded to the district court with instructions to permit the United States to amend its complaint with respect to the State minimum producer price regulations and thereupon to delete that portion of the order which enjoins enforcement of the State minimum producer price regulations with respect to milk resold by the distributors to the federal government.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1961.

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ernment has exclusive legislative jurisdiction on the installations, the State Act regulating the same subject matter—*i.e.*, the purchase of milk—is preempted. Finally, assuming that the state law was assimilated on Oakland, Travis and Castle as federal law, federal enforcement officials, and not the appellants, would be responsible for prosecuting violations of it. *Johnson v. Yellow Cab Co.*, 321 U.S. 383, 392–393.

See also footnote 5, *supra*, p. 6.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 17

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

On Appeal From the United States District Court for the Northern District of California, Southern Division.

Reply of Dairy Institute of California, Milk Industry Foundation, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, and General Dairy Industry Committee of Southern California, as Amici Curiae, to Memorandum for the United States in Response to Jurisdictional Statement.

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IN THE

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No. 239

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Interest of Amici Curiae.

The interest of present *amici* has been stated in detail in the brief previously filed by such *amici* in support of appellants' jurisdictional statement.

ARGUMENT.

This Case Urgently Requires Decision by the Supreme Court of the United States of Important Questions of Law; the Case Should Not Be Disposed of in the Summary and Partially Non-Adjudicative Fashion Proposed in the Memorandum Filed by the Solicitor General in Response to Appellants' Jurisdictional Statement.

Despite the importance of the issues involved, the District Court below reached its decision in a summary, injunction proceeding without trial or the taking of evidence except in affidavit form. On March 27, 1961, after protracted and fruitless efforts to settle findings of fact and conclusions of law prepared by the United States, the District Court struck from its Memorandum Opinion its direction to the United States to prepare such findings of fact and conclusions of law and adopted the balance of its memorandum Opinion as the District Court's findings of fact and conclusions of law [R. 819]. Even as thus limited the Memorandum Opinion contained erroneous factual statements (J. S. App. pp. 24-28).

The Solicitor General now proposes that this type of summary handling of the case be continued through summary affirmation of the judgment of the District Court as to State regulation of wholesale pricing applicable to sales of fluid milk to federal agencies (Memo. pp. 5-6). On the other hand, the Solicitor General proposes that California regulation of minimum producer prices applicable to such sales of fluid milk now be permitted because of a change in federal procurement policy since the time

gt entry of the District Court judgment, but without any adjudication of the *right* of the State of California to enforce such minimum producer pricing, and without any concession by the Federal Government of such right in the State of California.[1]

Despite inconsistent assertions elsewhere in the memorandum for the United States,[2] the described suggestion of the United States tacitly, but nevertheless firmly, concedes that there is no conflict between the Armed Services Procurement Act and enforcement under the California Milk Stabilization Act of minimum producer pricing regulations. The same tacit concession is also made as to California regulation of minimum wholesale pricing, since the only reason suggested in the memorandum for the United States for affirmation of the District Court judgment as to minimum wholesale prices is the claim that the territories in question are under exclusive federal jurisdiction (Memo. pp. 5-6). It is obvious that the District Court decision was based primarily upon a conclusion that the California Milk Stabilization Act is invalid, when applied to sales of fluid milk to federal agencies, because of conflict between that act and the Armed Services Procurement Act (J. S. App. p. 54). It is equally obvious from the jurisdictional statement and supporting *amici* briefs (and from the memorandum filed for the United States) that there is no such conflict. This important question of law urgently requires decision by the Supreme Court of the United States.

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[1]Memo. pp. 5, 13, fn. 11.

[2]Memo. pp. 4-6, fn. 5, 13, fn. 11.

Likewise the question of exclusive jurisdiction over the military areas involved, as between the United States and the State of California, requires decision by the Supreme Court of the United States, particularly after the summary disposition of this issue by the District Court in its Memorandum Opinion. The California Statute of 1872 upon which the United States relies (J. S. App. pp. 104-5) is a consent by the State to federal purchase of *land*, without any express cession, or consent to acquisition, of *jurisdiction*. Additionally on this issue, appellants rely upon a California Statute of 1897 (J. S. App. pp. 105-6) which comprehensively applies to every known method of acquisition by the United States of land for military purposes. Appellants accordingly assert with merit that the 1872 statute conferred no jurisdiction upon the United States over California land purchased by the United States, but that even if the contrary were true, the 1897 statute qualifies the earlier 1872 statute. *James v. Dravo Contracting Co.*, 302 U. S. 134, supports appellants' contention. This case is distinguished in the memorandum for the United States solely on the argument that the two California statutes are separate enactments, whereas in *James* they were all part of one statute (Memo. pp. 9-10). The circumstance that the 1897 statute was later in time than the earlier 1872 statute strengthens rather than weakens appellants' contention that the later statute qualifies the earlier statute, and in any event there were two separate statutes in *James* but codified into one statute prior to the time the case arose (302 U. S. 134, at p. 145). Here against the extremely important

question of jurisdiction over the military areas involved requires decision by the Supreme Court of the United States.

The suggestion in the memorandum for the United States for summary disposition of this case (by permitting for the time being California's enforcement of producer fluid milk pricing regulations, but prohibiting, by judgment, California's enforcement of wholesale fluid milk pricing regulations) is further without merit for the following reasons:

(1) Milk distributors required to return to producers the minimum producer price from federal sales, but without any regulation of minimum wholesale pricing as to such sales, must either absorb losses or get out of the federal business altogether. Such losses inevitably will impair distributors' efficiency with consequent injury to consumers, particularly in an industry the inherent lack of economic stability in which caused the California Legislature to protect consumers by enactment in the first instance of the Milk Stabilization Act (Cal. Agr. Code, Secs. 4201-4204).

(2) The described losses will also occasion contrary again to the stated purposes of the Milk Stabilization Act) unusual disruption of market conditions because of the large volumes of federal purchases, and will tend to drive out of business smaller distributors whose limited resources will not permit them to absorb losses from federal sales and stay in business.

(3) Enforcement of minimum producer prices by the Director of Agriculture as to federal sales will

*See, e.g., Amicus Brief, Petaluma Cooperative Creamery, pp. 2-4.

be rendered, as it already has been, most difficult by inability to enforce minimum wholesale prices (Cases cited, Brief of present *amici*, p. 5, fn. 9).

(4) There is no distinction, in effect upon federal purchasing, between the minimum producer pricing provisions and the minimum wholesale pricing provisions of the California Milk Stabilization Act, this being the position of the United States in the District Court below and the holding of the District Court (Original Record, pp. 11; 670-672).

(5) The California Milk Stabilization Act requires the concurrent existence of both its minimum producer pricing and its minimum wholesale pricing provisions (Cal. Agr. Code, Secs. 4351, 4351.5).

(6) While prohibition of California enforcement of minimum wholesale fluid milk pricing regulations as to federal sales is attended by substantial detriment to the statutory policy of the State, to consumers, and to the dairy industry, there is no substantial financial detriment to the United States from permitting California enforcement of such regulations, as only 30% of the total volume of fluid milk purchased by federal agencies in California is purchased with appropriated moneys for troop issue.[4]

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[4] R. 814, 816, 817.

Conclusion.

It is accordingly again submitted that appellants' jurisdictional statement presents substantial issues requiring decision by this Court, and not the summary and partially non-adjudicative disposition of this case suggested in the memorandum for the United States.

Dated: Pasadena, California, December 29, 1961.

Respectfully submitted.

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IN THE

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CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

APPELLANTS' REPLY MEMORANDUM

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IN THE

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

APPELLANTS' REPLY MEMORANDUM

The government's memorandum, filed December 13, 1961 [hereinafter cited Gov't. Br.], requests summary permanent as to one provision of the injunction below and summary affirmance of the remaining provisions. The summary disposition of the case in the trial court led to the commission of prejudicial error by the trial court. J. S. App. 24-28. This appeal affects the jobbing operation of the milk stabilization statutes of 23 states and requires, not further summary disposition, but plenary consideration in this Court upon full argument and briefing. J. S. App. 7-8, 133-134.

In addition, the government's brief in critical passages, misstates the record. This reply will deal, as summarily as possible, with the basic errors contained in that brief, and thereafter with the specific matters in it which are in most need of correction.

JURISDICTION

The government's actions were brought in the District Court under 28 U.S.C. 1331 and 1345 to restrain enforcement of the California milk stabilization act (Ch. 17, Div. 6, Calif. Agr. Co[1] as unconstitutional under Article 1, Section 8, Clause 17, of the United States Constitution as applied to milk producers and milk distributors selling milk to three military installations in California. R. 1-7, 155-161, 171-175. The constitutionality of the state enactment under Article 1, Section 8, Clause 17, is presented for decision because of the claim by the government that Clause 17 is per se exclusory of state authority, even without implementation by Congress, where a state granted consent to the federal acquisition of land but did not make a cession of jurisdiction over such land. Section 34, 1872 California Political Code.[2] On this issue, appellants assert that Clause 17 is not per se exclusory of state law and becomes exclusory only as Congress chooses to avail itself of this grant of power. See *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 260

[1] Article 1, Section 8, Clause 17, is set out in Appendix A, page 17

[2] Section 34, 1872 California Political Code is set out in Appendix A, page 17

(1956). This is the construction given to the remaining grants of power in Article I of the Constitution. *Parker v. Brown*, 317 U.S. 341, 362-363 (1943).

The claim of unconstitutionality was presented by the government in its motions in the District Court for preliminary injunction (action No. 29930) and for summary judgment (action No. 29973), and thereafter a case was presented in which the injunction may be granted on grounds of federal unconstitutionality. [illegible] *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 87 (1927). The case therefore comes within the three-judge District Court procedure of 28 U.S.C. 2281 and the appeal lies with the appellate jurisdiction of this Court under 28 U.S.C. [illegible] *Florida Lime Growers v. Jacobsen*, 362 U.S. [illegible] (1960).

THE REACH OF THE MILK STABILIZATION STATUTES OF TWENTY-THREE STATES, AS APPLIED TO SELLERS TO THE UNITED STATES, SHOULD BE DECIDED UPON BRIEFS ON THE MERITS AND ORAL ARGUMENT.

1. The district court, *inter alia*, struck down as [illegible] unconstitutional under Article I, Section 8, Clause 17,

the California producer (i.e. dairy farmer) milk price regulations on the ground that the dealer reselling the milk made deliveries on tracts of land within exclusive federal jurisdiction. J. S. App. 59. Appellee government seeks to avoid appellate review of this portion of the injunction by asking that the judgment below be remanded with instructions (1) to allow the complaints to be amended, and (2) to delete that portion of the injunction which enjoins enforcement of the state minimum producer price regulations. Gov't. Br. 5 & 14.

No confession of error is made by the Solicitor General, and no request is made that the judgment below be reversed with directions to dismiss the action. Compare United States v. Munsingwear, 340 U.S. 36 (1950). The government asserts in this Court, as in the trial court, that California cannot lawfully regulate producer milk prices where the milk is resold to the United States. Gov't. Mem. 5; R. 670-672. This question, therefore, will be a recurring one, certain to be repeated, not only in California but in the 22 states having similar statutes, because of the purchase of milk by the United States at its nation-wide military installations.[1] The issue whether appellant state officers can constitutionally enforce the established state minimum producer prices with respect to milk farmers selling to dealers for processing and resale to the

[1] The government asserts that federal jurisdiction exists over 3,050 installations in 48 of the states aggregating an area more than 200 miles the size of the District of Columbia. Inventory Report On Jurisdictional Status Of Federal Areas Within The States, General Services Administration, 1960, page 2.

United States is therefore before the court and requires decision.

II. There also is presented to the court for decision the question whether California can regulate the price at which dealers may sell milk to federal military installations. The issue is important to the 29 states which, like California, either (or both) directly set the minimum wholesale prices for fluid milk, or indirectly establish a minimum price by prohibiting below-cost sales.

The California wholesale milk stabilization statute was enacted to protect consumers by eliminating wasteful and expensive distribution practices and to prevent collusive control of the market through the development of monopolies in distribution. Calif. Agr. C. 4359(a) & (b); Tinley, Public Regulation Of Milk Marketing In California, 1938, 45-63. Further, with producer milk stabilization, the prices of factors accounting for nearly 80 percent of the selling price of milk by dealers is fixed either by law or by collective bargaining contracts with labor unions. Tinley, op. cit. 78. These factors include raw product cost, wages, utility costs and labor. With such high fixed costs, the legislature reasonably concluded that stability in the marketing of milk was necessary to insure that dealers would have reasonable expectations of being able to meet their obligations, particularly labor and raw

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Alabama, Arkansas, California, Connecticut, Florida, Louisiana, Maine, Massachusetts, Mississippi, 1942 Miss. Code 6501, et seq., Montana, Nevada, New Hampshire, New Jersey, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, Washington. 7 U.S. Atty. Gen. 1943-44.

product costs. Tinley, op. cit. 78. Calif. Agr. C. Sec. 4355-4360. These objectives are deserving of judicial protection.

Pacific Coast Dairy v. *Dept.*, 318 U. S. 285 (1943), upon which the government relies for the proposition that the California wholesale milk price regulations are unconstitutional as applied to dealers selling to Castle, Travis and the Oakland Army Terminal, is inapplicable. Gov't. Br. 2, 6, 7. In *Pacific Coast Dairy* the court carefully noted that the California Supreme Court in *Consolidated Milk Producers* v. *Parker*, 19 C. 2d 815; 123 P. 2d 440 (1942), had held that the state had no jurisdiction to fix wholesale prices for milk sold to the United States at the Presidio of San Francisco. *Pacific Coast Dairy* v. *Dept.*, 318 U. S. 285, 292 & 292 n. 4. The court was therefore cognizant that under state decisional law the United States had acquired jurisdiction over the Presidio of San Francisco as a result of the government's having filed metes and bounds descriptions and a plat of the Presidio in the San Francisco Recorder's office pursuant to California Statutes of 1897, Chapter 56, page 51.[6] *Consolidated Milk Producers* v. *Parker*, 19 C. 2d 815, 816-817.[7] In *Pacific Coast Dairy* v. *Dept.*, the State Department of Agriculture had conceded that Moffett Field was

[6] California Statutes of 1897, Chapter 56, page 51 are set out in Appendix A at page 15.

[7] *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), and Opinions California Attorney General N.S. 1905 (1939) cited in *Pacific Coast Dairy*, 318 U.S. 285, 292 n. 4 also dealt with the Presidio of San Francisco where the cession was made under the 1897 California statute.

within federal jurisdiction. *Pacific Coast Dairy* v. *Dept.*, 318 U. S. 285, 293. Since the court specifically relied on the Consolidated Milk case for its determination of state law, this concession was taken as an admission that jurisdiction over Moffett Field had been ceded under the 1897 California statute *Pacific Coast Dairy* v. *Dept.*, 318 U. S. 285, 293 n. 8. The decision in Pacific Coast Dairy, therefore, is not applicable to military installations, such as Castle, Travis, and the Oakland Army Terminal, for which the government has never filed metes and bounds descriptions and the plat as required by the 1897 California cession statute. R. 695, 696, 700, 701. No concession is made here, as was made in Pacific Coast Dairy, that the State lacks jurisdiction of these installations. J. S. App. 14-21.

THE GOVERNMENT'S AUTHORITIES FAIL TO SUPPORT ITS SUGGESTION FOR SUMMARY AFFIRMANCE.

1. The government's case that it has exclusive jurisdiction over the installations here involved is bottomed on the *obiter dictum* expressed in an opinion by a predecessor California Attorney General that California 1872 Political Code, section 34, cedes jurisdiction. 23 Ops. Cal. Atty. Gen. 14, 19 (1954). Govt. Br. 9. The only authority cited was *Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930) which construed Arkansas Acts of 1903, Act 180, page 346, to cede jurisdiction over Camp Pike to the United States. *Id.*, 281 U.S. 647.

655.[7] The opinion in 23 Ops. Cal. Atty. Gen. 14 at 19 failed to consider that the Arkansas statute both consented to the purchase of land and also ceded jurisdiction over the land so purchased. Arkansas Acts of 1903 Act 180, page 346.[8] This statute sharply contrasts to California 1872 Political Code, section 34, which contains no language ceding jurisdiction to the United States. The California 1872 statute in this respect is similar to 1927 Acts of Arkansas, Act 108, page 302,[9] which only consented to the purchase of land by the United States. The court, in *Wilson* v. *Cook*, 327 U.S. 474, 486-487 (1946), found that no express grant of legislative power was made and therefore held that the statute did not surrender state legislative jurisdiction to the government. The opinion in 23 Ops. Cal. Atty. Gen. 14 also failed to consider the California Court of Appeal decision in *People* v. *Brown*, 69 C. A. 2d 602, 605; 159 P. 2d 686 (1945), which held that the 1897 California Statute (Stats. 1897, Ch. 56, p. 51, codified into Sec. 114, Gov. C., by Stats. 1943, Ch. 134, p. 898) was the controlling military land jurisdiction statute. Similarly, no analysis was made of the decision in *Gilmore* v. *Lime Point*, 18 Cal. 229, 259 (1861), where the California Supreme Court expressed doubt that a federal purchase of land by condemnation

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[7] The dicta in Surplus Trading Co. v. Cook, 281 U.S. 647, 650, that a state may not condition its cession of jurisdiction was expressly overruled in James v. Dravo Contracting Co., 302 U.S. 134, 146-149 (1937).

[8] Arkansas Acts of 1903, Act 180, page 346, is set out in Appendix A, pages 18-19.

[9] 1927 Acts of Arkansas, Act 108, page 302, is set out in Appendix A, pages 19-20.

passed jurisdiction to the United States with [illegible] express cession of jurisdiction.

The statement in 23 Ops. Cal. Atty. Gen. 13, at 19 was *obiter dictum* because the opinion specifically refused to determine in a hypothetical context the extent to which jurisdiction had been transferred over Fort Ord, the particular installation in question. 23 Ops. Cal. Atty. Gen. 14, 21. Because of this, amici curiae appellants have concluded that the *dictum* expressed in 23 Ops. Cal. Atty. Gen. 14 must give way to the reasoning expressed in *Wilson v. Cook*, 327 U.S. 474, 486-487; *Palmer v. Lake Pond*, 18 Cal. 229, 259, and in *People v. Brown*, 36 Cal. A. 2d 602, 605; 159 P. 2d 686.

II. The government argues that the provision in Section 113, Government Code, that the State "reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States," applies only to lands "ceded or conveyed" to the government but does not apply to lands "purchased" by the United States at the Oakland Army Terminal. Gov't. Br. 11. The answer is that the term "conveyed" when used in reference to real property imports of transfer of title. *Boehe v. Castillo*, 154 Cal. 672, 677; 98 Pac. 1067 (1908); see *Williams v. Paige*, 160 U.S. 55, 76 (1895). "Purchase" when used in reference to land acquired by the United States includes acquisition by deed and by condemnation

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[1] California Government Code Section 113 is set out in Appendix A at page 21

Kohl v. *United States*, 91 U.S. 367, 374 (1876). Therefore, when title to several of the tracts at the Oakland Army Terminal were purchased by the government by deed and by condemnation, it obtained the land by conveyance within the meaning of Section 113, Government Code. This is the construction given the 1891 predecessor statute to Section 113 by this court. In *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 527 (1938), the Court held that California Statute of 1891, Chapter 181, page 262 [12] (codified into Gov. C. sec. 113 by Calif. Stats. 1943, Ch. 134, p. 898) reserved state criminal jurisdiction over land whose title was conveyed to the United States by California Statutes of 1905, Chapter 60, page 54.[13]

It is also suggested that the phrase "the administration of the criminal laws" in California Statutes of 1891, Chapter 181, page 262, and its codified successor, Government Code, section 113, reserved only the right to serve criminal process, and did not retain state criminal jurisdiction. Gov't. Br. 11. *Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938) is inapposite. As noted above, the Court held that California retained criminal jurisdiction under the 1891 statute over land conveyed in 1905 to the United States. *Id.*, 304 U.S. 518, 527. See *Bowen* v. *Johnston*, 306 U.S. 19, 28-29 (1939). Also opposite is a 1903 opinion of the United States Attorney General which held that a Louisiana statute

[12] California Statutes of 1891, Chapter 181, page 262, is set out in Appendix A at page 21.

[13] California Statutes of 1905, Chapter 60, page 54, is set out in Appendix A at pages 21-22.

(1892 Acts of La., No. 12, p. 10)[14] reserving the "administration of the criminal laws" was effective to retain state criminal jurisdiction over areas ceded to the United States. 24 Ops. U.S. Attys. Gen. 617 (1903).

The government seeks to distinguish *James v. Dravo Contracting Co.*, 302 U.S. 134, 143 (1937) so as to avoid the construction that the California 1897 statute qualified the earlier 1872 statute. Gov't Br. 9-10. Contrary to the statement in the government's memorandum, the *Dravo* case did involve two West Virginia statutes enacted at different times. Govt. Br. 9. The first paragraph of Section 3, Chapter 1, Article 1, of the 1931 Code of West Virginia was a codification of an 1881 consent to purchase statute.[15] The third paragraph of the 1931 West Virginia statute was an amendment to the cession provisions of 1909 Acts of West Virginia, Ch. 61, p. 494. The only difference between the West Virginia and California statutory history is that the 1881 and 1909 West Virginia statutes were codified in 1931, while the 1872 and 1897 California statutes were codified in 1943. See legislative history of the California enactments, *id.* 8 App. 105-106. Therefore the term "conveyed" in the 1897 California enactment includes lands acquired by the government at Castle and Travis by "purchase" under the 1872 consent statute, just as the phrase "later so

[14] 1892 Acts of Louisiana, No. 12, page 10, is set out in Appendix A, page 23.

[15] Section 4, Chapter 20, p. 265, 1881 Acts of West Virginia, and 1909 Acts of West Virginia, Ch. 61, p. 494, are set out in Appendix A, pages 20-21, 23-24.

acquired" in the West Virginia 1931 statute was held to include lands purchased by the government under the West Virginia 1881 consent statute. *James v. Dravo Contracting Co.*, 302 U.S. 134, 143-144 (1937). *People v. Brown*, 60 C.A. 2d 602, 605; 159 P. 2d 686 (1945).

THE GOVERNMENT'S MEMORANDUM IN CRITICAL PASSAGES INCORRECTLY STATES THE RECORD.

The government's memorandum represents that the United States acquired the Travis tracts of land upon which sales and deliveries of milk are made during the period 1942-1943. Gov't. Br. 8. The Travis land records (R. 978-992) prepared by the Air Force and offered as part of the government's case, show that more than ninety separate tracts of land were acquired at Travis subsequent to the 1942-1943 period, and that delivery of milk is made to one such tract (No. 49) acquired in 1946. R. 978-990, 991-992. The misstatement regarding the tracts where milk is sold and delivered is material for several reasons.

First, tracts acquired after March 14, 1941, cannot lie within federal jurisdiction since this is the date of the most recent omnibus letter accepting federal jurisdiction over installations in California as required by Revised Statutes Section 355, as amended Act of October 9, 1940, 54 Stat. 1083; *Adams v. United States*, 319 U.S. 312, 313 (1943). R. 201. Tract 49 at Travis was purchased by deed dated May 26, 1946. R. 991, 979. Delivery of milk is accepted by the government on tract 49 at Dining Hall No. 6. Dining Hall

No. 7 and at the hospital, R. 992; since there has been no acceptance of jurisdiction by the government as required by federal law, no claim can be made that deliveries of milk onto Tract 49 occur on an area within federal jurisdiction. See Gov't. Br. 5-6. The statement complained of conceals the existence of state jurisdiction over Tract 49 at Travis.

The second reason why the misstatement is material is that the government changes the delivery points for milk *post litem motam* from tracts where the milk is used to tracts of land with better jurisdictional credentials. For example, prior to February of 1960, milk was received at Castle at the post commissary and at the troop messes located on Tract 12. R. 425, 456, 812-813. Title to Tract 12 was acquired by the government on March 17, 1947 (R. 427), a date subsequent to March 14, 1944, the date of the latest letter of acceptance of jurisdiction. R. 201. Suit against the supplier at Castle was filed in the state courts on February 5, 1960 (R. 964), and ten days later on February 15, 1960, the government changed the delivery point for milk from the commissary and troop messes on Tract 12 to a vacant lot on Tract A, a civilian housing tract acquired July 17, 1943, located outside the main gates at Castle. R. 424-425, 437, 456, 813. Because the point of delivery of milk can be changed by the government to any tract within the installation, judicial inquiry must extend to every tract within the installation. Otherwise, there would be no end of the litigation, as the government would simply change delivery points

to a tract whose jurisdictional status had not been litigated.

Lastly, the contracts of sale for milk are not executed at Travis, but at higher procurement headquarters where the offers of contract are accepted. R. 972, 993, 1004, 1022.

The government brief makes also a material error in stating that the lands at the Oakland Army Terminal were purchased in 1950. Gov't. Br. 10. The record is opposite. The non-leased lands at the Terminal were acquired by deeds dated April 29, 1941; May 5, 1941; July 7, 1941; March 2, 1942, and July 23, 1943. R. 442. Land was also acquired at the Terminal in condemnation actions in the United States District Court, Northern District of California, Southern Division, as follows: Civil No. 21578-S, filed January 15, 1941; Civil No. 21930-L, filed July 25, 1941, and Civil No. 23099-S, filed January 18, 1944. R. 442, 809. No mention is made of the leased land at the Terminal which lies within state jurisdiction, and on which delivery of milk is accepted (Tract A-119). R. 99, 809, 701. See *Standard Oil* v. *Johnson*, 316 U.S. 481 (1942).

CONCLUSION

It is submitted that the questions presented by this appeal are substantial and have not been rendered moot by anything said in the government's memorandum. The questions are important to federal-state

relations, and should be resolved by the court u
oral argument and briefs on the merits.

Respectfully submitted.

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APPENDIX A

CONSTITUTION AND STATE STATUTES

United States Constitution. Article 1. Section 8. Clause 17

"The Congress shall have power . . .

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—"

Section 34. California Political Code. Enacted March 12, 1872

"34. The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State, for the purpose of erecting forts, magazines, arsenals, dock yards, and other needful buildings, upon the express condition that all civil process issued from the Courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crimes, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

1872 Pol. C., sec. 34, eff. March 12, 1872; codified into Gov. C., sec. 111, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 1009, until repealed eff. Sept. 19, 1947, by Stats. 1947, Ch. 1552, p. 3163.

California Statutes of 1897, Chapter 56, page 51

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated: *and provided further*, that this State reserves the right to serve and execute on said lands all civil process not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said limits.

"SEC. 2. This Act shall take effect immediately."

Stats. 1897, Ch. 56, p. 51, eff. March 2, 1897, codified into Govt. C., sec. 111, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 808, until repealed eff. Sept. 19, 1947, by Stats. 1947, Ch. 1432, p. [illegible]

1903 Acts of Arkansas, Act 180, page 346

"Section 1. The State of Arkansas hereby consents to the purchase by, or made or hereafter made, by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, custom house, light house, lock, dam, dry dock, hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all

grounds thus purchased by the United States, within the limits of this State, is hereby ceded to the United States.

"Provided, that this grant of jurisdiction shall not prevent execution of any process of this State, civil or criminal, upon any person who may be on said premises."

"Section 2. This State releases and relinquishes her right to tax, any such site, grounds or real estate, and all improvements which may be thereon or thereafter erected thereon, during the time the United States shall be and remain the owner thereof."

1927 Acts of Arkansas, Act 108, page 302

SECTION 1. That Section 6603 of Crawford & Moses' Digest is hereby amended to read as follows:

"That the consent of the State of Arkansas be and is hereby given to the acquisition by the United States, by purchase, or otherwise with adequate compensation, of such land in Arkansas as in the opinion of the Federal Government may be needed for the establishment, consolidation and extension of National Forests in the State, for the purpose of the Act of Congress entitled "An Act to Enable any State to cooperate with any other State or States, or with the United States, for the protection of the Watersheds of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers," approved March 1st., 1911, (36 Statute, 961), and acts supplementary thereto and amendatory thereof; provided that this Section applies only in those counties where

the United States now owns land comprising National Forests and in Counties adjoining the aforesaid Counties; further provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil process in all cases, and such criminal process as may be issue under the authority of the State of Arkansas against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this Act had not been passed."

SECTION 2. That Section 4567 of Crawford & Moses' Digest is hereby amended to read as follows:

"Power is hereby conferred upon the Congress of the United States to pass laws and to make or provide for the making of such rules and regulations of both a civil and criminal nature; and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as have been acquired or may hereafter be acquired under the provisions of this Act."

Section 4. Chapter 20. 1881 Acts of West Virginia

"In pursuance of the seventeenth clause of the eighth section of the first article of the Constitution of the United States, the consent of the Legislature of West Virginia is hereby given to the purchase or condemnation, whether heretofore or hereafter made or had by the government of the United States, or under its authority, of any tract or parcel of land within the limits of the state, for the purpose of erecting thereon light houses, beacons, signal stations, post offices, custom houses, court houses, locks, dams, and works for

the improvement of the navigation of any water course, and other needful buildings or structures. The evidences of title to such land shall be recorded as in other cases. But the quantity of land to be so acquired shall not exceed twenty five acres in any one place."

California Government Code Section 113 (Stats. 1943, Ch. 134, page 898)

"113. The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation."

California Statutes of 1891, Chapter 181, page 262

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of the State and the service of civil process therein.

"SEC. 2. This act shall take effect immediately." Stats. 1891, Ch. 181, p. 262, eff. March 31, 1891, codified into Gov. C. Sec. 113, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 7, 1955, by Stats. 1955, Ch. 1147, p. 2036.

California Statutes of 1905, Chapter 60, page 54

"SECTION 1. The State of California does hereby recede and regrant unto the United States of America,

the "Cleft" or "Gorge" in the granite peak of the Sierra Nevada mountains, situated in the county of Mariposa, State of California, and the headwaters of the Merced river, and known as the Yosemite Valley, with its branches or spurs, granted unto the State of California in trust for public use, resort and recreation by the act of congress entitled "An act authorizing a grant to the State of California of the Yosemite Valley and of the land embracing the "Mariposa Big Tree Grove," approved June 30th, 1864; and the State of California does hereby relinquish unto the United States of America and resign the trusts created and granted by the said act of congress.

"SEC. 2. The State of California does hereby recede and regrant unto the United States of America, the tracts embracing what is known as the "Mariposa Big Tree Grove," granted unto the State of California in trust for public use, resort and recreation by the act of congress referred to in section 1 of this act; and the State of California does hereby relinquish unto the United States of America and resign the trusts created and granted by the said act of congress.

"SEC. 3. This act shall take effect from and after acceptance by the United States of America of the recessions and regrants herein made, thereby forever releasing the State of California from further cost of maintaining the said premises, the same to be held for all time by the United States of America for public use, resort and recreation, and imposing on the United States of America the cost of maintaining the same as a national park. Provided, however, that the recession and regrant hereby made shall not affect vested rights and interests of third persons."

1892 Acts of Louisiana. No. 12. page 10

"SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That the United States shall have power to purchase or condemn in the manner prescribed by law, upon making just compensation therefor, any land in the State of Louisiana, not already in use for public purposes, required for custom-houses, court houses, arsenals, national cemeteries, or for other purposes of the government of the United States.

"SEC. 2. Be it further enacted, etc., That the United States may enter upon and occupy any land which may have been, or may be purchased or condemned, or otherwise acquired, and shall have the right of exclusive jurisdiction over the property so acquired during the time that the United States shall be or remain the owner thereof for all purposes, except the administration of the criminal laws of said State, and the service of civil process of said State therein, and shall hold the same exempt from all State, parochial, municipal or other taxation."

1909 Acts of West Virginia, Chapter 61, page 494

"SEC. 1. That the consent of the legislature of West Virginia be and is hereby given to the acquisition by the United States, by purchase or by condemnation with adequate compensation of such lands in West Virginia as in the opinion of the federal government may be needed for the establishment of such a national forest reserve in that region: provided, that the state of West Virginia shall retain a concurrent jurisdiction with the United States in and over such lands so far that civil process in all cases, and such criminal process as may issue under the authority of the state of West Virginia against any person charged with the commission of any crime without or within said jurisdiction, may be executed thereon in like manner as if this act had not been passed.

"SEC. 2. That power is hereby conferred upon congress to pass such laws as it may deem necessary to the acquisiton, as hereinbefore provided, for incorporation in said national forest reserve of such forest covered lands in West Virginia as in the opinion of the federal government may be needed for this purpose.

"SEC. 3. Power is hereby conferred upon congress to pass such laws and to make or provide for the making of such rules and regulations, of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the management, control and protection of such lands as may be from time to time acquired by the United States under the provisions of this act."

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. [redacted] 17

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

AMICUS JURIAE REPLY MEMORANDUM OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC. TO MEMORANDUM OF THE UNITED STATES IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

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In the Supreme Court
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OCTOBER TERM, 1961

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AMICUS CURIAE REPLY MEMORANDUM OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC. TO MEMORANDUM OF THE UNITED STATES IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENT

INTEREST OF AMICUS CURIAE

In replying to the Solicitor General's Response to Appellants' Jurisdictional Statement, Consolidated Milk Producers of San Francisco, Inc., (hereinafter called Consolidated) adopts Appellants' Reply Memorandum, but without intending to minimize Appellant's reply as to Distributor regulation Consolidated

particularly replies to the Solicitor General's contention that the change in military procurement policy by the United States warrants a summary disposition of this case.

Consolidated's particular interest in this case has been set forth in its Amicus brief in support of Appellants' Jurisdictional Statement.

ARGUMENT

CLARIFICATION OF CONSTITUTIONALITY OF THE CALIFORNIA MILK ACT AS APPLIED TO PRODUCERS WHOSE MILK IS RESOLD TO FEDERAL GOVERNMENT IS AN IMPORTANT ISSUE

First, the Solicitor General's suggestion that this Court summarily remand the instant cause to the district court for a deletion of that part of the final order enjoining enforcement of minimum producer price regulation, if accepted, would leave the California Milk Stabilization Act under a cloud of unconstitutionality as to its application to producers whose milk is purchased by distributors for resale to the Armed Forces.

The unsettled state of the law in this situation would encourage distributors with Armed Forces contracts to pay producers for their milk less than the minimum price established by the Director of Agriculture for the State of California, pursuant to his authority under Sections 4143, 4204, 4230, 4246, 4247 and 4249 of the California Agricultural Code.[1] Efforts

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[1]California Milk Stabilization Act, Chapter 17, Division 6, California Agricultural Code.

of the California Attorney General to enjoin such violations would readily be met with a citation to the three Judge District Court's memorandum opinion that the California Milk Stabilization Act is unconstitutional in its application to producers whose milk is resold to the Armed Forces by distributors. While Consolidated recognizes that allowing the United States to amend its complaint with respect to producer price regulation and the deletion from the District Court's Order enjoining California's enforcement of minimum producer prices vitiates the precedent value of that Court's memorandum opinion, nevertheless this unanimous decision by three eminent Federal Judges will be resorted to for precedent, albeit indirectly[2] and possibly surreptitiously.

Secondly, and probably more importantly, the Solicitor General seeks this summary treatment of California producer price regulation on the basis of the United States' change in procurement policy. Thus, the Solicitor General proposes that California milk producers be subjected to the whim of some anonymous United States official, an official that himself may be changed momentarily. On an issue as impor-

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[2]See *Blatz Brewing Co. v. Collins* (1945) 69 Cal. App. 2d 639 for such indirect precedent value. Therein the Court states as follows:

"This section was before this Court in the case of *Adolph Coors Co. v. Corbett* (Cal. App.) 123 P. 2d 74. While that case is no longer authoritative, as a hearing was granted in the Supreme Court, and then the case was dismissed by the parties, its analysis of section 38e and its conclusion as to the effect of the language in that section, upon which defendants here base their entire case, are logical, persuasive and correct. . . ."

tant as the constitutionality of the California Milk Stabilization Act the State of California and the milk producers in California deserve something more stable than "change in procurement policy"; this proposed rationale for summary treatment of producer price regulation is similar to a railroad ticket—"good for this date and this train only."

CONCLUSION

Consolidated submits that in addition to the other important issues presented by Appellants, an issue of substantial importance still exists with respect to producer price regulation for California and all other States having milk stabilization acts, regardless of the United States change in procurement *policy*. A mere change in *policy* should not be the basis of depriving the State of California, its milk producers, and other interested States, of a determination by this Court so as to clarify the present confused legal status of producer price regulation occasioned by the District Court's decision below.

Dated, San Francisco, California,
January 2, 1962.

Respectfully submitted,
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Of Counsel.

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Brief of Dairy Institute of California, Milk Industry Foundation, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, General Dairy Industry Committee of Southern California, as Amici Curiae in Support of Position of Appellants.

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Brief Filed With Consent of Parties.

All parties to the case have given their written consents to the filing of this brief. Such consents have been filed with the Court concurrently with the filing of the brief.

Interest of Amici Curiae.

Dairy Institute of California, Milk Industry Foundation, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, and General Dairy Industry Committee of Southern California are all nonprofit trade associations, the membership of each of which is composed of persons engaged in the business of processing and distributing fluid milk and other dairy products.[1]

All members of Dairy Institute of California, Alameda County Milk Dealers Association, San Francisco Milk Council, Santa Clara County Milk Dealers Association, Dairymens Service Association, and General Dairy Industry Committee of Southern California, and all members of Milk Industry Foundation doing business in California, are subject to the California Milk Stabilization Act.[2] All such members, as well as mem-

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[1]Members of Dairy Institute of California process and distribute approximately 70% of all fluid milk and dairy products processed and distributed throughout the State of California. Members of Milk Industry Foundation (1145 - 19th Street, N.W., Washington, D. C.) operate throughout the United States and in some foreign countries. Members of Alameda County Milk Dealers Association, San Francisco Milk Council and Santa Clara County Milk Dealers Association have principal offices in the Northern California area in which the present case originated. Members of Dairymens Service Association have principal offices in Southern California in San Bernardino and Riverside Counties. Members of General Dairy Industry Committee have principal offices in the Southern California area.

[2]California Agricultural Code, Sections 4200 *et seq.*

bers of Milk Industry Foundation with offices outside California, are eligible to, and many of such members do, sell fluid milk and dairy products to agencies of the United States Government. All amici and their members, therefore, have an important economic interest in the determination of the questions presented by this case, and regard the decision of the United States District Court below as having an extremely adverse impact upon amici and their members and upon the right of the State of California, and of states generally, to deal effectively through legislation with the stabilization of the economy of the dairy industry.

ARGUMENT.

I.

The Decision of the District Court, Rendered Contrary to the Decision of This Court in the Penn Dairies Case, Thwarts the Administration of the California Milk Stabilization Act and Causes Irreparable Injury to the Consuming Public and the California Milk Industry in a Situation Where There Is Neither Economic Necessity nor Federal Constitutional Provision or Statute Requiring the United States to Override the Worthwhile Objectives of State Law.

In any consideration of the California Milk Stabilization Act it must be recognized at the outset that the ultimate objective of the Act is protection of the health and welfare of the consuming public, to be achieved by (1) stabilization of an industry characterized by disruptive competition and (2) insurance to the consuming public, through such industry stabilization, of an adequate and constant supply of fluid milk at reasonable prices. These are both the stated objectives of the Act[3] and the legal foundation upon which the constitutionality of the Act depends as a valid exercise of the State's police power.[4] Any substantial exceptions to the complete statutory plan of the Act, such as that permitted by the decision of the District Court in this case, inevitably prevent the Director of Agriculture from effectively carrying out such plan. The damaging result of the District Court's decision is accordingly not confined to the creation of a dairy industry problem,

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[3]Calif. Ag. Code, Sections 4200, 4201, 4205.

[4]*E.g. Nebbia v. New York*, 291 U. S. 502 (1934); *Jerseymaid Milk Products Co. v. Brock*, 13 Cal. 2d 620 (1939); *Ray v. Parker*, 15 Cal. 2d 275 (1940).

but extends in greater scope to frustration of economically desirable police power objectives of the State of California, with consequent injury to the consuming public.

The California Milk Stabilization is a most important exercise of the State's police power, applied to achieve stability for the past *twenty-five years* in that State's second largest industry. Such industry stability, and resulting insured public supply of fluid milk, are accomplished through establishment by the Director of Agriculture of minimum prices to be paid by distributors to producers for fluid milk and of minimum prices for sales of processed fluid milk by distributors at wholesale and retail. The present case presents the question of the application of the minimum producer and minimum wholesale pricing provisions of the Act to sales of fluid milk to agencies of the Federal Government upon land over which the State of California asserts jurisdiction.

The California Milk Stabilization Act provides that producers shall be paid by distributors a Class 1 return (the highest price return) for fluid milk sold for purposes of human consumption.[5] This is the category of usage of fluid milk at the three military installations involved in the present case.[6] A lesser price is required to be returned to producers for fluid milk which is utilized by distributors for purposes of manufacturing dairy products such as butter, cheese, cottage cheese, etc.[7] All distributors are required to pay a uni-

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[5]Calif. Ag. Code, Sections 4226, 4280, 4281.

[6]R. 643, 645, 646, 647.

[7]Calif. Ag. Code, Sections 4227, 4228, 4230, 4230.5.

form price to producers for fluid milk of like usage and like grade or quality.[8]

The California courts in construing the Milk Stabilization Act have expressly recognized that the basic purposes of the Act, namely, the achievement of economic stability in a large and complicated industry for the protection of the health and welfare of the consuming public, are defeated unless (1) all distributors pay their producers uniformly for milk of like usage and quality, and (2) all sales of fluid milk are subject to the Act. These courts have found that with "cut-price" exceptions for certain sales, the competitive stress in the dairy industry which caused the California Legislature to adopt the Act in the first instance will inevitably return with its consequent injury to the consuming public and to the dairy industry.[9] These courts have also rejected an attempt by cooperative as-

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[8]Calif. Ag. Code, Section 4204(b).

[9]"The purpose of said chapter . . . is to eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of fluid milk and cream. . . . Thus provisions which protect the producer by establishing a fair price to him and affording him security for the payment of the price due him for milk and cream by means of a bond, are incident to the broader purpose to protect the public milk supply." (*In re Willing*, 12 Cal. 2d 591 (1939).) "Prescribed minimum prices fail of their purpose if they lie in the shadow of cut prices. . . . A price below a fixed minimum for milk produced in the state endangers those established standards for the milk industry that safeguard the public health and leads successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk production, and generally injurious effects on the public health." (*Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818 at 822, and 826 (1942) (rev'd on other grounds, 318 U. S. 285 (1943). See also, *Jerseymaid Milk Products Co. v. Brock*, 13 Cal. 2d 620, at 637-638 (1939); *Kay v. Parker*, 15 Cal. 2d 275 at 281 (1940); R. 344, 345.)

sociations of producers acting as distributors to secure exemption from the provisions of the Act specifying minimum returns by distributors to producers.[10]

The California Milk Stabilization Act requires the concurrent existence of both its minimum producer pricing provisions and its minimum wholesale pricing provisions. The Director of Agriculture has no authority to separate the two types of pricing provisions but instead is required to establish minimum wholesale prices in marketing areas where minimum producer prices are established.[11] Both producer pricing and wholesale pricing regulations stand upon exactly the same constitutional basis in respect to the exercise by the State of its police power authority over the dairy industry.[12]

In an industry as complicated as the milk industry the calculation of producer returns is difficult where different usages are involved and distributors pool the milk of a number of producers for purposes of deter

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[10] "Petitioners . . . point out that a cooperative, from the very nature of its organization, cannot return the price fixed by the 'Director' for milk, if its net returns are less than such price; that in cooperatives, the producer-member is the owner, and that he receives the profits from its marketing activities, and should therefore bear any loss. It must be assumed that the foregoing effect upon cooperative organizations must have been foreseen by the Legislature, but that they considered that the health and general welfare of the people as a whole were paramount over such matters as the internal management of such associations, and their customary method of operation. *The proof of a legislative intent to make the Milk Control Act all-inclusive is so apparent and strong that considerations of the foregoing nature must give way before it.*" *United Milk Producers v. Cecil*, 42 Cal. App. 2d 748, p. 760 (1941); emphasis supplied.

[11] Calif. Ag. Code, Sections 1351, 1351.5

[12] *Nebbia v. New York*, 291 U. S. 502 (1934); *Jerseymaid Milk Products Co. v. Frock*, 13 Cal. 2d 620 (1939); *Ray v. Parker*, 15 Cal. 2d 275 (1940).

mining payment to each producer in the pool.[13] In the case of cooperative associations of producers acting as distributors the problem of proper enforcement of minimum producer payments is intensified by code provisions permitting adjustments or deductions by any such association to its members "including the blending of proceeds received from the sale of fluid milk by such cooperative in other markets."[14] Competitive pressures to avoid or reduce minimum producer payments, or to engage in destructive trade practices at the wholesale level, are substantially relieved by the establishment of minimum wholesale prices since the latter prices are required to be established by the Director of Agriculture in the first instance so as to secure a return to the distributor of a price "sufficient . . . to cover costs . . . and reasonable return upon necessary capital investment . . . ."[15] The minimum wholesale pricing provisions of the act accordingly greatly aid the Director of Agriculture in enforcing minimum producer pricing returns, and in carrying out the purpose of the Act to eliminate "destructive and demoralizing trade practices" (Cal. Ag. Code Sec. 4201). It is for these reasons that the California Milk Stabilization Act represents a comprehensive regulation of the entire fluid milk industry with required enforcement on the part of the Director of Agriculture of both minimum producer pricing provisions and minimum wholesale pricing provisions, and with no exceptions to the Act.[16]

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[13]Calif. Ag. Code, Sections 4292, 4295.

[14]Calif. Ag. Code, Section 4295.

[15]Calif. Ag. Code, Section 4360.

[16]*Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818 at 822, 826 (1942); (rev'd on other grounds, 318 U. S. 285 (1943)).

Prior to the institution of the present action appellants had filed actions against cooperative associations of producers acting as distributors charging that the producer members of such associations had not been paid the minimum return prices required to be paid in respect to federal sales.[37] A California trial court in the only action which has so far been permitted to proceed to trial[38] on the issue of underpayment of producers by cooperative associations of distributors selling fluid milk to the United States, expressly found that such sales were being made by the cooperative at prices insufficient to enable the cooperative to return to its producers the State established minimum producer price.

Obviously if a cooperative corporation or any other distributor makes sales of fluid milk to federal agencies, but returns from such sales to producers less than the minimum producer prices established by the Director of Agriculture for the particular marketing area in question, the cost of fluid milk to such distributor is not uniform (as required by Calif. Ag. Code Sec. 4204(b), cited above) with that of other distributors who do comply with the Milk Stabilization Act and pay their producers the State established minimum producer return from all sales, including federal sales. By simple

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[37] R. 150, 516-523, 550, 655-656, 744, 758, 760-791; *cf. Warne v. Milk Producers Association* (Stanislaus County Superior Court No. 69305).

[38] *Paul v. Allied Dairymen, Inc.* (5th Civ. No. 147 in the California District Court of Appeal, Fifth Appellate District, on appeal from a judgment of the Tulare County Superior Court in trial court action No. 56335). This case was enabled to proceed to trial after a partial stay of injunction as to enforcement of minimum producer prices was granted in the present case by the United States Supreme Court on July 3, 1961.

process of economic competition, such underselling distributor's competitors in the distribution field are then left with the following choices:

(1) To go out of the federal business altogether and thus deprive the producers who supply such competing distributors of a substantial market for their milk; or

(2) To meet the competition of the underselling distributor, with substantial loss to such competing distributors and the producers who supply them.

Either result is not only inequitable but completely contrary to the entire purpose of the California Milk Stabilization Act which is to secure *stabilization* in the dairy industry.

The decision of the District Court in this case thwarts all the purposes of the California Milk Stabilization Act with substantial resulting damage to the industry and the consuming public. Such decision not only permits distributors who choose to disregard the State's minimum producer pricing regulations to incur a lower raw product cost than that of their competitors; and prevents the State's enforcement of any provision of the Milk Stabilization Act as to federal sales, but in addition carves a tremendous exception into the Act representing 6% of all fluid milk sales in the State of California.[19] The resulting loss to the California dairy farmer from the drop in price on federal sales permitted and encouraged by the District Court decision has been estimated at not less than $6,000,000 annually.[20] Likewise, the $106,000,000 investment in

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[19]R. 348.

[20]R. 684.

plant and physical facilities of California milk distributors is impaired by the ruling of the District Court. Milk distributors whose maintenance of such plant and physical facilities requires a certain volume of milk, including that from federal sales, but who cannot obtain from federal sales the established minimum wholesale price nor in turn pay over to their producers the established minimum producer price, must either absorb losses or get out of the federal business altogether. Such losses inevitably impair distributors' efficiency with consequent injury to consumers, particularly in an industry whose inherent lack of stability caused the California Legislature to protect consumers by enactment of the California Milk Stabilization Act.[21] These losses occasion (contrary again to the stated purposes of the California Milk Stabilization Act) unusual disruption of market conditions because of the large volume of federal purchases and will tend to drive out of business smaller distributors whose limited resources will not permit them to absorb losses from federal sales and stay in business. Finally, and perhaps most important, California consumers must participate with the dairy industry in subsidizing the losses from federal sales for the benefit of purchasers from federal commissaries.[22]

All of these undesirable consequences have been accomplished by the District Court in this case in a summary proceeding where no evidence was taken except in affidavit form, and where such differences existed

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[21] California Agricultural Code, Sections 4201-4204. These factors of economic instability are set forth in detail in *Nebbia v. New York*, 291 U. S. 502 at 517-518 (1934). See also footnote 9, *supra*.

[22] R. 344.

between the parties and the Court at the end of the proceeding that the District Court could not settle findings but instead was required to adopt its opinion as its findings of fact.[23]

73% of the fluid milk sales to Castle Air Force Base, 64.5% of such sales to Travis Air Force Base, and 78% of such sales to Oakland Army Terminal[24] are for resale through government retail stores known as commissaries which are required to be operated without cost to the United States.[25] These stores may be operated by private persons[26] and are in competition with nearby privately owned retail stores which must observe the minimum wholesale pricing requirements of the California Milk Stabilization Act.[27] Less than 30% of the total volume of fluid milk purchased for the three described areas is purchased through money appropriated for troop ration.[28]

The decision of the District Court below was that application of the California Milk Stabilization Act to federal purchases at Castle and Travis Air Force Bases, and at Oakland Army Terminal, whether for resale through commissaries, or for troop ration, is prevented because of conflict between such Act and a federal procurement function as expressed in the Armed

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[23]R. 585-600, 648.

[24]R. 643, 645, 646.

[25]R. 634. See also Section 613, Department of Defense Appropriation Act, 1962, 75 Stat. 365, and prior annual Department of Defense Appropriation Acts, and House Rep. No. 109, 80th Cong. 1st Sess., p. 30.

[26]10 U. S. C., Section 2482.

[27]R. 383, 552, 639, 819.

[28]R. 643, 645, 646.

Services Procurement Act of 1947.[29] The decision is necessarily in error as to fluid milk purchased for use or resale through post exchanges, officers' clubs, non-commissioned officers' messes and post restaurants, since the latter are required to be operated through non-appropriated funds[30] and the Armed Services Procurement Act does not apply to any military purchases except those "for which payment is to be made from *appropriated* funds."[31]

As to the approximately 70% of fluid milk purchases for resale through commissaries at the three military installations, such commissaries, while financed with appropriated funds,[32] are required to be operated without cost to the government.[33] Further, the Armed Services Procurement Act exempts commissary purchases from formal advertising and bid procedures.[34] As to the remaining less than 30% of total fluid milk purchases for troop ration, this Court almost twenty years ago expressly held that there was no conflict between the Armed Services Procurement Act and state statutes regulating prices for the purchase and sale of fluid milk.[35]

The requirements of the present Armed Services Procurement Act in respect to competitive bidding are not in any material way different from similar provisions in force at the time of the *Penn Dairies* case. In

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[29]10 U. S. C., Section 2301, *et seq.*

[30]R. 516, 538-540. Section 623, National Military Establishment Appropriation Act, 1950, 63 Stat. 987, at 1022.

[31]10 U. S. C., Par. 2303(a).

[32]R. 634, 643, 645, 646.

[33]See fn. 25, *supra.*

[34]10 U. S. C., Par. 2304(a)(8).

[35]*Penn Dairies v. Commission*, 318 U. S. 261 (1943).

fact the enactment of the Armed Services Procurement Act in its present form, after the *Penn Dairies* decision, without any express statutory provision declaring state price fixing regulations inapplicable to fluid milk purchased by federal agencies, furnishes a persuasive reason for concluding today, as at the time of the *Penn Dairies* case, that such laws as the California Milk Stabilization Act are not considered by the United States Congress as an interference with a federal function.

For all the additional reasons hereafter stated the District Court erred in concluding that the California Milk Stabilization Act "places a prohibition on the Federal Government within the meaning of the *Public Utilities* case. . ."[36]

(1) As in the *Penn Dairies* case, the State of California does not assert that its Milk Stabilization Act places federal procurement officers under criminal jeopardy, and the California Supreme Court has ruled that the act regulates "*not* the army, but the distributors who are independent contractors with the federal government."[37]

(2) The Pennsylvania Milk Control Law has also been held inapplicable to federal procurement officers.[38]

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[36] *United States v. Warne and Mosk*, 190 Fed. Supp. 645, at 657, referring to *Public Utilities Commission v. United States*, 355 U. S. 534 (1958).

[37] *Pacific Coast Dairy v. Dept. of Agriculture*, 19 Cal. 2d 818, 830 (rev'd on other grounds, 318 U. S. 285 (1943). This is also the construction of the California Act by the United States Comptroller General (Opinion B-35906, Sept. 1, 1943).)

[38] *Penn Dairies, Inc. v. Milk Control Commission*, 344 Pa. 635, 26 A. 2d 441, 445, aff'd 318 U. S. 261 (1943). The question has been similarly decided in Massachusetts (*Milk Control Board v. Gorselini Dairies, Inc.*, 301 Mass. 174, 16 N. E. 2d 641, 1938).

(3) The applicable provisions of the California Milk Stabilization Act do not differ, in regard to application to federal purchasing agents, from the provisions of the Pennsylvania Milk Control Law at the time the latter came before the United States Supreme Court for decision in the *Penn Dairies* case.[39]

(4) Where minimum producer prices are established under federal marketing orders such prices are enforced in sales of fluid milk to the Federal Government notwithstanding the competitive bid requirements of the Armed Services Procurement Act and notwithstanding the possibility of a price increase to federal agencies.[40] There can be no distinction in legal theory or in practical effect between the minimum producer pricing provisions of federal marketing orders applicable to fluid milk, and the California minimum producer and minimum wholesale pricing provisions applicable to fluid milk in an area where there are no federal marketing orders.

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[39]Calif. Ag. Code, Sec. 4301 ("No distributor shall sell . . . and no retail store, restaurant, confectionary or other place for consumption on or off the premises, shall purchase . . . at less than the prices established . . ."); Penn. Act of April 28, 1937 (Pa. Stats., Title 31, Sec. 700J-103 (defining "milk dealer" as "any person who purchases or receives or handles . . . milk")) and J-807 (providing for criminal penalties against "milk dealers")).

[40]*Knudsen Brothers Dairy, Inc. v. Benson* (U.S.D.C. Conn., Civil Action 8145, 1969) (case on appeal on other grounds under title of *Knudsen Brothers Dairy, Inc. v. Freeman*, Court of Appeals, Second Circuit, No. 26098) ("The plaintiff advances the argument that the payment order conflicts with the policy of competitive bidding utilized by the armed forces in procurement programs and should therefore be invalidated. It is true that the assessment may cause a partially regulated handler of outside milk to submit a higher bid figure as a result of the assessment. * * * Any increase in price which may indirectly result to the government in the purchase of milk supplies can therefore be justified since the requirement for payments to the fund insures a supply of quality milk in sufficient quantities which otherwise might be endangered due to the economic forces peculiar to this industry.")

(5) The Solicitor General in the present proceeding has stated that "the federal government, while not conceding that California can regulate producer prices . . . has concluded as a matter of procurement policy not to assert immunity from these minimum prices but to accede to full compliance with these requirements."[41] This statement inevitably concedes a lack of conflict between any federal function expressed in the Armed Services Procurement Act and the enforcement under the California Milk Stabilization Act of minimum producer pricing regulations, as otherwise the Solicitor General would be without authority to waive on behalf of the government the requirements of the Armed Services Procurement Act. This concession must also extend to minimum wholesale pricing regulations since from an economic standpoint compliance with either California minimum producer prices or minimum wholesale prices will affect the ultimate price of fluid milk to federal agencies.[42]

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[41]Memorandum for the United States, *Paul v. United States*, Oct. term, 1962, No. 19, p. 5.

[42]The United States and the District Court below drew no distinction between the economic effect on federal milk purchases of California's minimum producer pricing regulations and of minimum wholesale pricing regulations. [R. 13-14, 15-16, 154-155, 508-509, 526-528, 581-582, 666-669.] 80% of the minimum wholesale price established by the California Director of Agriculture represents costs fixed by law such as minimum producer raw product price, taxes and wages established by collective bargaining agreement (Tinley, "Public Regulation of Milk Marketing in California," 1938, p. 78). The balance of the wholesale price established by the State accordingly has only a minimal impact upon federal purchases estimated, for example, at 1.87¢ per quart at Oakland Army Terminal (See Brief for Appellants, *Paul v. United States*, Oct. Term, 1962, No. 19, at p. 79), a figure closely approximating the 1.6¢ per quart impact of the State-established wholesale price sustained by this Court in the *Penn Dairies* case (318 U. S. 261, at p. 280).

The Solicitor General's suggestion of course is unsatisfactory in any event since it is a concession which as a matter of federal procurement policy could be withdrawn or modified as quickly as it was made in the first instance. What is necessary in the present proceeding is a determination by the Court of the *right* of the State of California and not a determination in respect to day to day changes in federal procurement policy. The suggestion of the Solicitor General is tantamount to an admission that there is no constitutional objection to the enforcement by the State of California of either its minimum producer or its minimum wholesale pricing regulations against producers and distributors selling fluid milk to the Federal Government, since as noted above both sets of regulations have an economic effect upon the Federal Government and both stand upon the same constitutional basis for their validity as an exercise of state police power. If, therefore, federal procurement officials may lawfully concede to the State's enforcement of minimum producer pricing regulations, they must inevitably concede to the State's enforcement of minimum wholesale pricing regulations.

(6) Federal policy expressly supports, rather than opposes, stabilization of the economy of dairy farmers.[43]

(7) This Court has itself distinguished the *Public Utilities* case from the *Penn Dairies* case in respect to lack of application of the Pennsylvania Milk Control Law to federal officers.[44] The Solicitor General has recognized the validity of the distinction.[45]

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[43] U. S. C., Par. 1446b.

[44] *Public Utilities Commission v. United States*, 355 U. S. 534, at pp. 543-544 (1958).

[45] Jurisdictional Statement, *United States v. Georgia Public Service Commission*, No. 794, Oct. Term, 1961, p. 15.

(8) There is no economic necessity from the federal standpoint to compel a construction of the Armed Services Procurement Act as overriding state milk regulations statutes. The approximately 70% of fluid milk purchased by commissaries is not intended by any federal policy to place such commissaries at a competitive advantage over nearby competing privately owned retail stores, and as previously noted, such commissaries operate wtihout cost to the Government.[46] Purchasers from commissaries will not be substantially affected by enforcement of State minimum producer and minimum wholesale pricing regulations as such buyers will continue to get the advantage of a price without a store mark-up and the commissaries will continue to get the advantage of special volume discount provisions specified in State minimum pricing orders.[47] As to the remaining 30% of fluid milk purchased for troop ration Congress has specifically recognized that service personnel are not underpaid.[48]

In summary, therefore, the decision of the District Court has thwarted the purposes of the California Milk Stabilization Act, has caused irreparable injury to the California consuming public and to the dairy industry, and has been rendered contrary to the decision of this Court in the *Penn Dairies* case in a situa-

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[46]Senate Report 601, 83rd Cong., 1st Sess. p. 8; footnote 25, *supra.*

[47]R. 345, 346.

[48]Print No. 115, Hearings Before the House Armed Services Committee, 1949-1950, p. 4001.

tion where neither economic necessity nor constitutional provision nor statutory policy compel such a result or indicate the serving of any federal purpose by such a result.

This situation is particularly aggravating to federal-state relations because of the obvious efforts of federal procurement personnel in this case to take affirmative action to avoid the application of state law. Thus, at Castle Air Force Base, immediately upon appellants' filing suit to enforce the California Milk Stabilization Act as to federal purchases then being made over property as to which there was no question of state jurisdiction, the government directed the milk distributor to cease making delivery of milk to buildings located on such property and to deliver the milk to a civilian housing tract located just outside the base proper over which parcel the government asserted jurisdiction.[49] There was no overruling federal purpose which required such conduct. The economic effect of application of the California Milk Stabilization Act to producers and distributors selling fluid milk to the three military bases involved is minimal. Despite these considerations the conduct of the federal procurement agencies has caused all the detrimental consequences summarized above and has tended to create local animosity for no purpose.

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[49]R. 350-351, 363, 642-643.

II.

The State of California Retains Jurisdiction Over Castle and Travis Air Force Bases, and Oakland Army Terminal.

Appellants in their brief have treated in detail the subject of state jurisdiction over the three military areas in question. Amici fully support appellants' position and will therefore not restate or present argument in full on the issue of jurisdiction, particularly in reference to Oakland Army Terminal which involves a claim by the United States of acquisition of jurisdiction under California Government Code Section 126. However, amici believe it important to argue briefly the issue of jurisdiction of Castle and Travis Air Force Bases since these two land areas are typical, in respect to the method of federal acquisition, of the great bulk of federal military areas within the State of California.

The position of the District Court, relying exclusively on an opinion of the California Attorney General,[50] was that exclusive jurisdiction over Castle and Travis Air Force Bases was acquired by the United States under a California statute of 1872[51] merely by the purchase by the United States, with the statutory consent of the State of California, of such lands for military purposes.[52] A reading of the 1872 statute

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[50]23 Ops. Cal. Atty. Gen. 14 (1954), summarized in a 1958 Report of the California Attorney General, "Jurisdiction Over Federal Enclaves in California," p. 73.

[51]1872 Political Code, Section 34, as amended, Stats. 1939, Ch. 710, p. 2231.

[52]*United States v. Warne and Mosk*, 190 Fed. Supp. 645, at 651-653 (D. C. N. D. Cal. 1960).

will disclose that it is a consent restricted to the purchase of *land* and that nowhere in the statute are there any provisions for cession or transfer of *jurisdiction* to the United States. Statutes in derogation of state sovereignty are strictly construed; there is no presumption of surrender of state jurisdiction; and the surrender of such jurisdiction will not be read into a statute unless expressly stated in the statute.[53] Rejecting contrary expressions in earlier decisions, this Court has held that a state may reserve jurisdiction in whole or in part over land purchased by the United States with state consent for military purposes.[54] If a state statute conditions transfer of jurisdiction to the Federal Government upon performance by the Federal Government of certain acts, such acts must be fully and completely performed or else the surrender of jurisdiction is not effective.[55]

In 1897 the State of California adopted a statute, in effect at the time the United States acquired Castle and Travis Air Force Bases,[56] providing that the United States, in order to obtain exclusive jurisdiction over *all* lands "now held, occupied or reserved by the Gov-

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[53]*Wilson v. Cook* 327 U. S. 474, at 486 (1946); *Silas Mason Co. v. Tax Commission*, 302 U. S. 186 (1937); *James v. Dravo Contracting Co.*, 302 U. S. 134 (1937); *Adams v. United States*, 319 U. S. 312 (1942); *Larson v. South Dakota*, 278 U. S. 429 (1929); *Standard Oil Co. v. Johnson*, 10 Cal. 2d 758, at 766-767 (1938).

[54]*James v. Dravo Contracting Co.* 302 U. S. 134 (1937).

[55]40 Rev. Stats., Sec. 355, as amended, Act of October 9, 1940, 54 Stat. 1083; *United States v. Watkins*, 22 F. 2d 437 (D. C. N. D. Cal. 1927); *Gill v. State*, 216 S. W. 637 (Tenn. 1919); *State v. Mendez*, 61 P. 2d 300 (Nev. 1936); *Valley County v. Thomas*, 97 P. 2d 345 (Mont. 1939); *Six Companies v. Dil'inney*, 2 Fed. Supp. 693 (D. Nev. 1933).

[56]California Stats. 1897, Ch. 56, p. 51.

ernment of the United States for military purposes or defense, or which may be hereafter ceded or conveyed to said United States for such purposes," observe certain conditions specified in the statute, namely, the filing in the appropriate County Recorder's office of a description by metes and bounds of the land acquired and a map or plat of such lands. It is conceded that as to Castle and Travis Air Force Bases the United States did not comply with the conditions specified in the 1897 statute.[57]

The case is accordingly clear that as to Castle and Travis Air Force Bases the United States has not acquired exclusive jurisdiction. Although the Federal Constitution in Article I, Section 8, Clause 17 may have given the United States the right to exercise exclusive legislation over land purchased with state consent, this consent was nevertheless validly conditioned by California on the performance by the United States of certain conditions which have never been met. The District Court held that the 1897 statute is a "cession" statute, inapplicable to land *purchases* by the United States, with State consent, for military purposes.[58] Such decision is in patent disregard of the exceedingly sweeping and plain words of the 1897 statute which applies to "*all* lands within this State now held, occupied or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded *OR CONVEYED* to said United

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[57] R. 643, 644, 646; see Memorandum for the United States, *Paul v. United States*, Oct. Term, 1962, No. 19, p. 5.

[58] *United States v. Warne and Mosk*, 190 Fed. Supp. 645, at 651, 653 (D. C. N. D. Cal. 1960).

States for such purposes . . . ."[5] Less ambiguous words could not have been used by the California Legislature to make this 1897 statute applicable to *all* California lands acquired by the United States for military purposes, whether such lands were acquired by state cession, or by *conveyance* upon purchase or condemnation or gift or any other method of acquisition. The *sole reliance* of the District Court in avoiding the provisions of the 1897 statute was on a 1954 opinion of the California Attorney General[6] in which opinion it is concluded, relying exclusively on the decision of this Court in *Surplus Trading Co. v. Cook*,[7] that the 1872 and 1897 California statutes are inconsistent with one another and that the only way to reconcile the two statutes is to regard the 1897 statute as treating of military purposes other than the "constitutional" military purposes spoken of in the 1872 statute.[8] This opinion of the Attorney General cannot be a controlling authority in this case, and is in error, for the following reasons:

(1) Such opinion asserts that the 1872 California statute applies to federal land acquisitions for "*constitutional* military purposes" but that the 1897 statute applies only to military acquisitions for "*unconstitutional purposes*." This assertion is without substance or statutory support as the 1897 statute applies to "*All* lands within this State now held, occupied or reserved by the Government of the United States for

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[5] California Statutes 1897, Ch. 58, p. 51.

[6] 23 Ops. Cal. Atty. Gen. 11 (1954).

[7] 281 U. S. 647 (1930).

[8] 23 Ops. Cal. Atty. Gen. 14, at 19.

military purposes or defense, or which may hereafter be *ceded or conveyed* to the United States for such purposes."[63]

(2) The 1872 and 1897 statutes are not inconsistent as stated in the opinion. Instead, the 1897 statute in respect to lands acquired for military purposes *qualifies* the 1872 statute by validly imposing conditions for the acquisition by the United States of jurisdiction over lands purchased by the United States with State consent, for military purposes. These conditions have never been met as to Castle and Travis Air Force Bases (fn. 57, *supra.*)

(3) The opinion concludes that jurisdiction was acquired by the United States, *by reason of compliance with the requirements of the 1897 statute*, over 15,809

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[63]The Presidio in California is perhaps the oldest military area in the state and is as fully qualified to meet the "'constitutional military purpose" test as any military area in the state. As to the Presidio it has been held by this Court (*Standard Oil v. California*, 291 U. S. 242 (1934)), that exclusive jurisdiction of the Presidio was acquired by the United States *under the 1897 statute*. If the 1897 statute did not pertain to "constitutional military purposes," it is impossible to conceive how this Court could have concluded that it was under *this statute* the United States acquired exclusive jurisdiction over the Presidio. Further, the completely inconsistent result of the opinion is laid bare by the fact that it concludes *as to the same military reservation*, Fort Ord, that the United States acquired exclusive jurisdiction under the 1897 statute as to a portion of the military area but was not obligated to comply with this statute as to the remainder of the military base because the statute did not have to do with "constitutional military purposes" (23 Ops. Cal. Atty. Gen. 14, at 21-22). Obviously if the statute applied to one part of Fort Ord it must inevitably apply to all parts of the same fort.

of the 29,010 acres of Fort Ord notwithstanding the fact that such lands were purchased by the United States, with State consent, for constitutional military purposes.[64] The opinion then becomes inherently contradictory in concluding that the 1897 statute does not apply to the remainder of Fort Ord. No doubt this was one reason the opinion (23 Ops. Cal. Atty. Gen. 14, at 21) stated:

> "We reserve opinion and comment as to the nature and extent of jurisdiction over this area and over other military enclaves in this state until specific factual situations giving rise to jurisdictional problems have been submitted to us for solution."

(4) The statute involved in *Surplus Trading Co. v. Cook*, unlike the 1872 California statute, contained an express cession of jurisdiction (281 U. S. 647, at 650-657).

(5) The dicta in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U. S. 534, 537 (1885), that a state may not validly condition acquisition by the United States of jurisdiction over lands purchased with the consent of the state for military purposes was expressly overruled by this Court in its decision in *James v. Dravo Contracting Co.* (302 U. S. 134, at pp. 164-160).

(6) The 1954 opinion obviously has not been adopted by the administrative agency concerned, the Department of Agriculture, nor by the present Attorney General.[65]

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[64] 23 Ops. Cal. Atty. Gen. 14, at 17, 21-22.

[65] R. 619, 620-621.

(7) If administrative opinions are to be given any weight in this case rather than the provisions of applicable statutes, the District Court opinion should be reversed if for no other reason than that counsel for administrative agencies of the United States has concluded that the United States does not acquire jurisdiction over military areas in California where the 1897 statute conditions have not been met.[66]

It is submitted, therefore, that the case for California jurisdiction over Castle and Travis Air Force Bases is clear and that such case may not be defeated by the erroneous administrative opinion contained in 23 Ops. Cal. Atty. Gen. 14.

Conclusion.

The Court is hereby requested again to state its position, as expressed in *Penn Dairies, Inc. v. Milk Control Commission*, 318 U. S. 261, that the State of California may constitutionally enforce both the minimum producer and minimum wholesale pricing provisions of its Milk Stabilization Act against distributors and producers selling fluid milk to the United States, and to declare that California exercises jurisdiction over the

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[66] *E.g.*, Jurisdiction Summary of Camp Cooke, California, dated November 4, 1957, issued by the Chief Engineer, Real Estate Division, Washington, D. C.; Jurisdiction Summary of Sharpe General Depot, San Joaquin, California, dated October 2, 1942, issued by the Office of Chief of Engineers, Washington, D. C., set forth in the Brief for Appellants, *Paul v. United States*, Oct. Term, 1962, No. 19, at pp. 112-114.

military installations here involved. Upon such declarations the judgments below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1962
No. 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division.

Amicus Curiae Brief in Support of Appellants' Brief of Protected Milk Producers Association of Paramount, California, Central Milk Sales Agency of Artesia, California, Harmony Valley Creamery Association of San Luis Obispo, California, San Diego Milk Association of San Diego, California, and San Diego County Milk Producers Council of San Diego, California.

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Brief Filed With Consent of Parties.

All parties to this case have consented to the filing of this brief. Their written consents are filed concurrently herewith.

Interest of Amici Curiae.

Protected Milk Producers Association of Paramount, California, Central Milk Sales Agency of Artesia, California, Harmony Valley Creamery Association of San Luis Obispo, California, and San Diego Milk Association of San Diego, California, are all non-profit cooperative marketing associations formed under the provisions of Chapter 4, Division VI of the Agricultural Code of the State of California; San Diego County Milk Producers Council is a nonprofit corporation formed under the general corporate laws of the State of California. The said organizations represent and are composed of 200 independent milk producers who own and operate a substantial majority of the dairy farms in Central and Southern California, and together said dairy farmers produce annually in excess of 85 million gallons of fluid milk. This milk is sold and distributed by the major milk processors and distributors doing business in the State. A substantial portion of the milk produced by these dairy farmers was previously sold and delivered to armed services bases, camps and establishments similar to those involved in this case and including some of them.

In the event the officials of the State of California are permanently enjoined herein from enforcing the provisions of the California Milk Stabilization Act, these milk producers will be deprived of a most substantial market outlet for their milk, with consequent serious and crippling financial losses to them.

The demoralizing effect of the judgments of the lower court upon the hitherto orderly production, distribution and sale of milk in this State (resulting from an eminently fair and impartial administration of its milk stabilization and control laws), cannot be over-emphasized. The wholesale distributors of milk are the "right arm" of the milk industry, and unless they are additionally controlled by being compelled to demand and receive prescribed minimum wholesale prices for milk, they cannot adequately and efficiently perform their own duties under the law. Unless law-abiding distributors are equally protected with the producers of milk, they will not be able to pay the prescribed minimum prices to the dairy farmers. This chaotic condition can lead only to violations and evasions of Federal and State laws and regulations.

Since, as shall be demonstrated later in this brief, the established *public policy* of the Federal and State governments relative to the production, distribution and sale of milk is the same, the undermining of the State's public policy can only lead to the defeat and undoing of the public policy of both governments.

This brief is being filed in a sincere attempt to prevent the evils which will follow any affirmance of the lower court's judgments and which the milk stabilization and control laws (both Federal and State) were designed to prevent and eliminate.

Summary of Argument.

Appellee, the Government of the United States, should be the first* to compel its agencies to cooperate with all other interested parties, by their requiring compliance by milk distributors with all Federal and State milk stabilization and control laws and regulations, which have been enacted and promulgated as a matter of public policy for the protection of dairy farmers and legitimate milk distributors, and ultimately for the preservation of the health and welfare of milk consumers, including our armed forces.

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*In *Goldman*, "The Words of Justice Brandeis" (p. 88), the following apt quotation appears:

"GOVERNMENT AS LAWBREAKER

"Decency, security, and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of law, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Ordinarily, one who aids, abets and encourages the commission of an unlawful act, is equally guilty with the lawbreaker. The State, of course, cannot but the Federal Government should prevent its agencies from aiding and encouraging milk distributors to violate State stabilization and control laws and regulations.

ARGUMENT.

I.

As Interpreted and Explained by This Court, Both the United States of America and the State of California Have Established by Statute a Like Public Policy With Respect to the Production, Distribution and Sale of Milk.

Section 204(2) of the Agricultural Act of 1954, 68 Stat. 899, provides:

> "It is the policy of Congress to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butter fat by encouraging dairy farmers to develop efficient production units, consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy."*

---

*The *Agricultural Marketing Agreement Act of 1937* had previously re-enacted and amended certain provisions of the Agricultural Adjustment Act (Act of May 12, 1933, 48 Stat. 31, as amended Aug. 24, 1935, 49 Stat. 750, 7 U. S. C. A. Section No. 601 *et seq.*). By Section 1, 7 U. S. C. A. No. 601, it is declared that "the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers" thus destroying the value of agricultural assets to the detriment of the national public interest. This interference is declared to "burden and obstruct the normal channels of interstate commerce."

By Section 2, it is declared to be the *policy of Congress*, through the exercise of the powers conferred upon the Secretary

This Court in at least two decisions has spelled out the serious problems which confront the dairy farmers and distributors of milk. The necessity for an efficacious solution of these problems was the underlying cause for the enactment of analogous statutes by the Federal and State governments. One of the two cases referred to, upheld the constitutionality of the Federal Agricultural Marketing Agreement Act of 1937 and a certain marketing order issued thereunder, whereas the other case upheld the constitutionality of the New York statute having similar objectives.

In the former case (*United States v. Rock Royal Co-Op*, 307 U. S. 533, 548, 59 S. Ct. 1001) this Court after stating that ". . . the Secretary of Agriculture, before promulgating Order No. 27, conducted public hearings attended by handlers, producers and consumers of milk and their representatives throughout the milk-shed," commented on the fact that *the hearings were jointly held by the Federal and State governments and added:*

> "The cooperation of the two governments was the culmination of a course of investigation and legislation which had continued over many years. The problem from the standpoint of New York was fully considered and the results set out in the Report of 1933 of the Joint Legislative Committee to Investigate the Milk Industry."

---

of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. * * *"

In the other case (*Nebbia v. New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469), where the constitutionality of the New York statute was upheld, the Court referred to the same historical background as was mentioned in the former case.

A reading and comparison of the pertinent language in the two decisions will immediately demonstrate that the "reason for the rule" was the same in each case. For convenience we have set forth in Appendix A the relevant portions of both opinions.

From the language quoted in Appendix A, it is obvious that both the Federal government and the State of New York were in complete agreement that "milk is an essential item of diet", that it "is highly perishable" and "cannot long be stored," that it is "a fertile field" and "an excellent medium for the growth of bacteria," that "it is most desirable to have adequate production under close sanitary supervision to meet the constantly varying needs" and that the above "facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business", that "only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk" and "failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination," that "cut-throat competition" among producers "would threaten the quality and in the end the quantity of fluid milk deemed suitable for" consumption and among the causes of low cost milk is "the prevalence of unfair and destructive trade practices

in the distribution of milk, leading to a demoralization of prices," and that "the fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control."

That both the Federal government and the State of California have the same public policy relative to the production, distribution and sale of milk conclusively appears from a comparison of the pertinent language of the California Act with what has been said above. Sections 4200 to 4203 inclusive of the California Milk Stabilization Act (California Agricultural Code, Division 6, Chapter 17) provide as follows:

> "4200. The production and distribution of fluid milk and of fluid cream and the dissemination of accurate scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of public powers of this State for the purpose of protecting the health and welfare of the people of this State.
>
> 4201. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry af-

fecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk, and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

4202. It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary, and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are hereinprescribed, after investigation and public hearings to prescribe such marketing areas and modify the same when advisable or necessary.

4203. The foregoing statements in this article of facts, policy and application of this chapter are hereby declared a matter of legislative determination."

Not only is the public policy of California similar to that of the Federal government but there is absolutely no conflict in any respect. Both policies have for their ultimate objective the preservation and protection of the health and welfare of the population.

II.

The Similarity of the Public Policy Enactments of Both the Federal and State Governments With Reference to the Production, Distribution and Sale of Milk, Undoubtedly Constrained Appellee to Abandon Its Position With Regard to the Minimum Price Required to Be Paid to Producers Under the California Act.

It should be borne in mind that the discriminatory price-cutting practices contended for by appellee, are not countenanced by any Federal *statute directly* mentioning or affecting the production, distribution or sale of "milk". The governmental immunity from state minimum price requirements claimed for certain geographically fortunate agencies of appellees, is at best based upon purported *implications* arising from *general* procurement statutes and regulations of such agencies.

Had Congress seen fit to disrupt the efficient functioning and operation of state milk control agencies and boards, and the orderly enforcement of state statutes, it would and properly should have placed the necessary language, creating such a valuable "immunity" right and privilege, in a *statute* dealing directly with the sub-

ject of "milk". The following language of the decision in *Penn Dairies v. Milk Control Commission*, 318 U. S. 261, 275, 63 S. Ct. 617, 623, is to the same effect:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden*, U. S. 188, 198, 199, 60 S. Ct. 182, 188, 84 L. Ed. 181; *United States v. Jackson*, 302 U. S. 628, 631, 58 S. Ct. 390, 392, 82 L. Ed. 488; *Posadas v. National City Bank*, 296 U. S. 497, 503, 505, 56 S. Ct. 349, 352, 353, 80 L. Ed. 351, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

When the matter first came to the attention of the Solicitor General, he undoubtedly recognized immediately that any *conflict* between the implications claimed to arise from any general procurement statute or regulation on the one hand, and the state statute on the other, was fatal to the contentions of appellee.

If there exists a conflict between the implications drawn from a general (Federal) procurement statute or regulation and the California public policy requirements of its statute, then *ipso facto* the same conflict exists between the former and established Federal public policy with reference to the production, distribution and sale of milk.

This argument is equally applicable to the California requirements fixing minimum wholesale prices to be paid

to distributors. In none of the Federal or State court decisions relating to the milk industry, has it ever been held or even intimated that the *production* and *distribution* of milk are distinct and divisible operations, which are not mutually dependent. The contrary is proved by the fact that the abuses in *distribution* (*e.g.*, cut-throat price-cutting) were the direct and motivating causes for the fixing of minimum prices for the *production* of milk. The two are "physically and inextricably intermingled" and constitute a single body, neither half of which can survive without the other.

III.

The Constitutional Right of a State to Fix Minimum Prices to Be Charged by Distributors of Milk, Can No Longer Be Questioned.

In *Nebbia v. New York*, (*supra*), this Court held that the pertinent New York statute was constitutional. There, the New York Milk Control Board had "fixed nine cents as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a 5-cent loaf of bread for 18 cents and was convicted for violating the board's order." His conviction was affirmed by this Court.

After stating that the question for decision was whether the Federal Constitution prohibited such state legislation, the Court explained in considerable detail the searching inquiry made by the 1933 New York Joint Legislative Committee, whose conclusions are set forth in Appendix A.

timately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public."

The forceful and compelling argument of this Court in the *Nebbia* case upholding the right of a state in a matter of public policy to protect its citizens, has never been challenged.

Nowhere in the opinion is there any slightest indication that the application of the decision would depend entirely upon the geographical whereabouts (*i.e.* whether without or within some favored government land) of the consumer or consumers of the milk sold. In the absence of statutory enactments to the same effect, public policy mandates of a state statute should not be nullified to favor only a comparatively few of the nation's millions of inhabitants.

IV.

This Court, by Reversing the Judgments of the Lower Court in Their Entirety, Will Stand Squarely Behind the Legislative and Executive Branches of the Federal Government and the State of California (as Well as Other States) in Their Efforts to Prevent and Eliminate Serious and Dangerous Abuses in the Milk Industry.

The necessity for full and complete cooperation between the United States of America and each state having a statute similar to that of the State of California, in the matter of enforcing the statutes and regulations of both pertaining to the production, distribution and sale of milk, cannot be overestimated. The Federal government operates, by virtue of its interstate powers, primarily in the field of *distribution*. In this field in many instances the United States is absolutely dependent upon aid from the state governments, for the reason that the latter are initially concerned with the *production* of milk. In *United States v. Rock Royal Co-Op (supra)*, the original proceedings instituted by the United States of America "had sought relief not only for violations of the Order of the Secretary of Agriculture but also, if the Court should find that the defendants or any of them were not subject to that Order, for violation of Official Order No. 126 issued by the Commissioner of Agriculture and Markets of the State of New York." In explanation this Court stated that "the two Orders are in pari materia, one covering milk moving in or directly burdening, obstructing or affecting

interstate commerce and the other covering milk in intrastate commerce." Later in the opinion the Court mentioned that the Secretary of Agriculture of the United States of America had found that the two were "physically and inextricably intermingled."*

Since, as we have demonstrated, the milk statute of California is not "inconsistent with an Act of Congress or the provisions or necessary implications of the Constitution", the legacy left to us by Mr. Justice Murphy in his dissenting opinion in *Pacific Coast Dairy v. Department of Agriculture*, 318 U. S. 285, 304, 305, 63 S. Ct. 628, 635, should be carefully considered and evaluated. He stated:

"We derive much of our strength as a nation from our dual system of federal government. To pro-

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*The dependence of the U. S. Department of Agriculture on state agencies in the doing of its own work, is well demonstrated in a pamphlet issued by that department entitled "*Questions and Answers on FEDERAL MILK MARKETING ORDERS*" (AMS-122), where in answer to the question "Does the Government provide any help in laying the groundwork before an order is issued by it?", the following answer is given:

"It is not ordinarily possible, or the Department of Agriculture to furnish personnel directly for the purpose of obtaining necessary background facts and information or for the purpose of drafting a proposed order for a new market. Within the limits of its personnel, the Department endeavors to furnish advice regarding the types and kinds of information which will be necessary and possible sources for securing it. It is also possible to furnish personnel for consultation with interested parties from time to time. Expert nongovernmental help to assist in laying the groundwork for a Federal order is generally necessary.

"Many Government agencies are able to contribute help in the preparation for a hearing. *State Departments of Agriculture, State extension and research workers, and Departments of Health* frequently provide information which is necessary background for order purposes. Persons interested in developing the necessary material should communicate with these agencies for whatever help or information they can furnish." (Italics added.)

note the harmonious working of that system the general clauses of the Constitution which broadly delineate the boundaries of state and national power should be construed by appraising the respective state and national interests involved and striking a balance which gives appropriate recognition to the legitimate concerns of each government. Since these boundaries are not absolutes, the question necessarily is one of reasonableness and degree. Cf. Holmes, J., dissenting in *Panhandle Oil Co. v. State of Miss. ex rel. Knox*, 277 U. S. 218, 222, 48 S. Ct. 451, 452, 72 L. Ed. 857, 56 A. L. R. 583, and again in *Springer v. Government of Philippine Islands*, 277 U. S. 189, 209, 210, 48 S. Ct. 480, 484, 485, 72 L. Ed. 845. This is the method which we have applied in testing state regulation of interstate commerce, and it should govern the construction of the exclusive legislation clause. If a state is acting in matters normally within its competence with which it is especially equipped to deal, to achieve important governmental ends such as the protection of the public health and welfare or the maintenance of orderly marketing conditions, the effects of its action should be allowed to extend into federal areas within its boundaries unless inconsistent with an act of Congress or the provisions or necessary implications of the Constitution. This formula allows the States to carry out important programs which must be of state-wide application to be effective and adequately recognizes the paramount character of federal power."

Appellee has not seriously disputed the numerous assertions in the various briefs filed in support of the position of appellants, concerning the losses, dangers and evils which have resulted and will continue to result from the decision of the lower court. The losses represented by the difference in prices following that decision, must necessarily be borne by someone. As a practical matter, if the losses are to be kept from the shoulders of appellee or of the personnel of our armed forces, there is no reason, legal, equitable or moral, why that burden should be shifted to the shoulders of a comparatively few dairy producers and distributors, rather than by taxation to the shoulders of the millions of Americans who are equally protected by such armed forces. If the members of our armed forces are not sufficiently compensated for their services or otherwise subsidized so that they can pay the same price for milk as others are required to pay then more direct means should be found to compensate them adequately.

Conclusion.

Twenty years have elapsed since the decisions in the *Penn Dairies* and *Pacific Coast Dairy* cases, by virtue of which the laws of one State were enforced and those of another nullified. In the interim, billions of dollars have been paid out by the Federal government to aid the farmer. In the light of this positive financial assistance, it is difficult to understand the theory on which appellee is contending that the Federal government should in this instance actually penalize the farmer by allowing and encouraging certain of its agencies to aid and abet the violation of state health and welfare laws.

For the reasons stated, the Court should reverse the judgments of the lower court, and should hold and declare that, in the absence of congressional action, no interference should be permitted by appellee's agencies which will prevent a state from enforcing its constitutional statute in a reasonable and non-discriminatory manner.

Dated: Paramount, California, August 21, 1962.

Respectfully submitted,

GEORGE E. ATKINSON, JR.,
Attorney for Amici Curiae.

APPENDIX A.

Federal Statute.

"*The Problem.*—In accordance with the provisions of the Act the Secretary of Agriculture, before promulgating Order No. 27, conducted public hearings attended by handlers, producers and consumers of milk and their representatives throughout the milkshed. No defendant, however, was represented. These hearings followed the presentation by the Agency to the Secretary and to the Commissioner of a proposed marketing agreement and order regulating the handling of milk in the New York marketing area with a request for action under the Federal and New York statutes. *The hearings were jointly held by the Federal and state governments.* The cooperation of the two governments was the culmination of a course of investigation and legislation which had continued over many years. The problem from the standpoint of New York was fully considered and the results set out in the *Report of 1933 of the Joint Legislative Committee to Investigate the Milk Industry.* This investigation was followed by the creation of the Milk Control Board with broad powers to regulate the dairy business of the state. This board had power to fix prices to be paid to producers and to be charged to consumers. A later New York act, the Boger-Allen Act, authorized the state commissioner to cooperate with the Federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government *to be carried out under joint administration.*

"The problem concerned with the maintenance and distribution of an adequate supply of milk in metropoli-

tan centers are well understood by producers and handlers. In the milkshed and marketing area of metropolitan New York these problems are peculiarly acute. It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. The sale of milk in metropolitan New York is ringed around with requirements of the health department to assure the purity of the supply. Only farms with equipment approved by the health authorities of the marketing area and operated in accordance with their requirements are permitted to market their milk. * * * Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufacturers are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contracts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condi-

tion for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, *cut-throat competition* even among them *would threaten the quality and in the end the quantity of fluid milk* deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act." (Italics added.)

United States v. Rock Royal Co-Op, 307 U. S. 548, 549, 550, 59 S. Ct. 1001, 1002.

APPENDIX B.

New York State Statute.

"The conscientious effort and thoroughness exhibited by the report lend weight to the (1933 New York Joint Legislative) committee's conclusions.

"In part those conclusions are:

"Milk is an essential item of diet. It cannot long be stored. It is an excellent medium for growth of bacteria. These facts necessitate safeguards in its production and handling for human consumption which greatly increase the cost of the business. Failure of producers to receive a reasonable return for their labor and investment over an extended period threaten a relaxation of vigilance against contamination.

"The production and distribution of milk is a paramount industry of the state, and largely affects the health and prosperity of its people. Dairying yields fully one-half of the total income from all farm products. Dairy farm investment amounts to approximately $1,000,000,000. Curtailment or destruction of the dairy industry would cause a serious economic loss to the people of the state.

"In addition to the general price decline, other causes for the low price of milk include a periodic increase in the number of cows and in milk production, the prevalence of unfair and destructive trade practices in the distribution of milk, leading to a demoralization of prices in the metropolitan area and other markets, and the failure of transportation and distribution charges to be reduced in proportion to the reduction in retail prices for milk and cream.

"The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent., because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the large organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices

for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.

"The legislature adopted chapter 158 as a method of correcting the evils, which the report of the committee showed could not be expected to right themselves though the ordinary play of the forces of supply and demand, owing to the peculiar and uncontrollable factors affecting the industry. The provisions of the statute are summarized in the margin." *Nebbia v. People of the State of New York*, 291 U. S. 502, 507, 508, 54 S. Ct. 505.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division

AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC. IN SUPPORT OF POSITION OF APPELLANTS

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AMICUS CURIAE BRIEF OF CONSOLIDATED MILK PRODUCERS OF SAN FRANCISCO, INC. IN SUPPORT OF POSITION OF APPELLANTS

This amicus curiae brief is filed on behalf of the Consolidated Milk Producers of San Francisco, Inc. (hereinafter called Consolidated) in support of the brief filed in this action by appellants which, at

the direction of this Court, treats both with the question of the jurisdiction of this Court over the controversy and with the merits of the several questions raised by it.

Pursuant to Rules of this Court, consent for the filing of this brief has been granted by all parties to this action and these consents have been filed with the Court concurrently with the filing of this brief.

THE INTEREST OF CONSOLIDATED IN THE LITIGATION

Consolidated is a non-profit corporation representing nearly 300 independent milk producers located in northern California. Approximately ten per cent of the output of its members is distributed to processing cooperatives; the balance is sold to commercial or conventional distributors. This is approximately in proportion to the statewide pattern of the distribution of fluid milk. Members of Consolidated are responsible for approximately ten per cent of the total production of fluid milk in California.

The primary purpose of Consolidated has been to provide its members with a means by which, through democratically elected representatives, they can deal with problems involved in the production and marketing of their products.

Reflecting the wishes of its members, Consolidated played a significant role in securing the enactment of the California Milk Stabilization Act[1] and in support-

[1]California Agricultural Code, Sec. 4200 et seq.

ing the stabilization programs adopted by the State Director of Agriculture under its authority.

The present Milk Stabilization Program has resulted from recognition by all segments of the milk industry, including dairy farmers such as those represented by Consolidated, and the public as well, that Government action was essential to enable the industry to provide the public with an adequate supply of milk at fair and reasonable prices which met sanitary and health requirements.

Professor J. M. Tinley in his authoritative study of the California milk industry has characterized two of the basic problems which confronted it:[2]

> "The gradual concentration of population in large cities has given rise to two important groups of problems: The first connected with the physical handling of milk and the protection of the health of consumers, and the second with economic relations between producers, distributors and consumers."

This Court has, in the landmark decision in *Nebbia v. New York*, 1933, 291 U.S. 502 at 517, recognized the perennial oversupply of fluid milk which contributes to the instability of the industry:

> "The fluid milk industry is affected by factors of instability peculiar to itself which calls for special methods of control. Under the best practical adjustment of supply to demand the industry must carry a surplus of about 20%, because milk, an essential food, must be available as demanded

[2]Tinley, Public Regulation of Milk Marketing in California (1938), p. 2.

by consumers every day in the year, and demand and supply vary from day to day and according to season; but milk is perishable and cannot be stored . . . thus surplus milk presents a serious problem as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream . . ."

The continued oversupply of fluid milk resulted in cut-throat competition between distributors and producers which became particularly acute during the depression years of the 1930's. The effect of this price competition resulted in both distributors and producers sustaining substantial losses. Inevitably, the independent milk producers, being small in size and at a disadvantage in bargaining with the distributors, assumed a large part of the burden to the point where their very existence was in peril:

". . . the rivalry between distributors for wholesale business led to the granting of certain services and concessions to wholesale customers, mainly stores and restaurants . . . [p. 26] as the struggle continued . . . wholesale margins declined to such a degree and cost of distribution (because of expensive services) increased so rapidly that none but a few distributors with the best of the wholesale trade were able to avoid losses . . . [p. 27] since 1930, large numbers of distributors in each market have been forced either to pass their increased cost on to producers in the form of a lower price or to suffer severe losses. . . . During the more severe milk wars . . . distributors often deducted their cost of operation from the reduced returns from the sale of milk

> and passed the rest on to producers. Producers involuntarily subsidized the intensive price cutting . . . as a general rule, they had no alternative but to take any price above manufacturing-milk prices that was offered to them. . . . [p. 29] . . . in 1932 and 1933, conditions had come to such a pass that producers were arrayed against producers as well as against distributors; and distributors against distributors a well as against producers . . .'' [p. 31] (*Tinley, supra,* pages 26-31).

It was then that producers and distributers turned to the Government for assistance in achieving stability in the marketing of milk.

The Agricultural Adjustment Act[3] was passed in 1933 giving the Secretary of Agriculture power to enter into marketing orders with producers and distributors engaged in interstate or foreign commerce of dairy products and providing further for the licensing of the distributors and producers handling such products. These Federal Marketing Orders provided for maintenance of minimum prices to be paid to producers and distributors for different classes of milk and further for marketing pools.

When it appeared that the Federal program could not control local markets, the industry turned to the states for legislative action. In 1935, the California legislature adopted legislation[4] empowering the Director of Agriculture to establish minimum prices which the producer must be paid upon adoption of a mar-

[3] 7 U.S.C. 601.

[4] California Agricultural Code, Sec. 4200 et seq.

keting and stabilization plan for a given area. This Act eliminated one of the main causes of ruinous price competition by stabilizing the prices paid by all distributors to producers for their milk.

Experience with exclusive producer price stabilization plans under the 1935 Act pointed out "that demoralized market conditions had resulted in numerous uneconomic trade practices which distributors in spite of continuous and strenuous efforts had been unable to eliminate, 'and which' in the long run would benefit neither consumers nor distributors and might eventually undermine even producer prices." (*Tinley, supra*, 78.)

The California legislature recognized the problems in 1937 by amending the State Milk Stabilization Act to authorize the Director of Agriculture to establish a minimum wholesale and retail price for milk in any area in which a marketing plan was in effect.[8] Producers, including Consolidated, were among those who urged the legislature to expand the program because they recognized that without industry-wide stability the producer pricing program was in peril.

Philosophically, the legislation is part of the "self-help" programs for agriculture which characterize marketing order legislation in California, the Federal government, and other states as well. Thus, the Director of Agriculture is authorized to divide the state into "marketing areas"[9] and, upon approval of

[8] Stats. 1937, Ch. 413, p. 1342.

[9] California Agricultural Code, Sec. 4274.

65% of the producers of "market milk" in a marketing area to establish a stabilization plan for it.[7] Each of the price stabilization plans with which we are concerned in this litigation was approved by the requisite number of milk producers.

For such an area, the director establishes minimum prices which distributors must pay producers[8] and minimum wholesale and retail prices for fluid milk.[9] In establishing such prices, he must observe certain specified criteria. Further, he must find such prices:

> "insure consumers an adequate and continuous supply of pure, fresh, wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed for normal fluctuations in production and in consumer demand for fluid milk, cream and skim milk for such marketing area."[10]

While changes have occurred in the national and state economy and in the distribution of fluid milk since the adoption of this legislation, basic problems continue to exist which have induced the state legislature not only to retain the program but to strengthen and improve it. The success of this approach to the peculiar problems of the fluid milk industry is indicated by the fact that similar marketing orders are now in effect in 23 other states, and in many areas under the authority of Federal legislation.

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[7] California Agricultural Code, Sec. 4271, 4272, 4273, 4351.
[8] California Agricultural Code, Sec. 4240.
[9] California Agricultural Code, Sec. 4351.
[10] California Agricultural Code, Sec. 4281.

In the late 1950's, distributors engaged in a vigorous economic competition for the military market. Military purchases for troop rations and resale in commissaries amounted to slightly over 6% of the total sales of fluid milk in California, they offered an important means by which distributors could dispose of excess market milk. As the struggle for the military market progressed, bid prices fell below the established minimum prices for sale by wholesalers.

When the State of California sought to enforce its minimum prices at the producer and wholesale levels with respect to milk delivered to the three military installations involved here, the United States brought this action.

In November of 1960, the District Court below declared unconstitutional both the producer and wholesaler minimum price regulations as applied to milk delivered to these installations. Distributors now felt free to disregard producer minimum prices and a price war resulted. Once again producers bore the burden of the price-cutting among distributors. Because of their unequal bargaining position, they were compelled to accept as the price for such milk what remained after the processor deducted the cost and profit of processing. The return to producers fell from the minimum price of $5.19 per hundredweight to as low as $2.75 per hundredweight. This resulted in their selling such milk for as much as $2.00 per hundredweight below their cost of production.

A significant portion of the total production of fluid milk in California is distributed to military in-

stallations such as those involved here. There is no market-wide pooling of milk and, consequently, the burden of producing substantially below cost for the military falls unequally upon producers with disastrous economic effect.

In August of 1961, Justice Douglas of this Court issued an order staying the injunctions of the District Court which restrained appellants from enforcing the state minimum producer prices. Following this action, the successful bid prices for the military market rose but were still below the established minimum wholesale prices and were also below the total of the cost to the producer and distributor of producing and processing the milk. The distributors are now delivering milk to the military installations at a loss. If this condition continues, industry-wide instability must result and the purposes of the California Milk Stabilization Program will be defeated. Thus, with respect to the deliveries to the military installations involved, even under the partial stay, the milk industry is essentially in the same position as it found itself in 1937. The economic reasons which led the entire industry, including Consolidated representing independent milk producers, to support an industry-wide minimum pricing program are as compelling now to the producers as they were then.

Many of the members of Consolidated have sustained serious financial losses as a result of the decision of the District Court. All are deeply concerned that the entire milk stabilization program providing for minimum prices at the distributor levels as well

as at the producer levels continue in effect. Consequently, Consolidated, in behalf of the many independent milk producers who compose its membership, has a direct and profound interest in the pending litigation.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT IMPROPERLY DENIES TO CALIFORNIA THE AUTHORITY TO PROTECT THE HEALTH AND WELFARE OF ITS RESIDENTS BY ENFORCEMENT OF MINIMUM PRODUCER PRICES AND MINIMUM DISTRIBUTOR PRICES FOR THE SALE OF FLUID MILK USED AS TROOP RATIONS AND FOR RESALE TO MILITARY PERSONNEL ON CERTAIN MILITARY INSTALLATIONS.

We concur with the arguments of Appellants treating both with the reasons why it is urged that this Court assume jurisdiction of this direct appeal and further why the decision of the District Court should be reversed. We concur, too, with the statement of the questions presented by this litigation set forth in Appellants' brief. No useful purpose will be served by dealing with all phases of these questions in view of the comprehensive and effective brief of Appellants. Without minimizing the importance of any argument made by them, this brief will be limited to certain aspects of these questions.

This action turns on the question of whether the minimum price regulations established under the California Milk Stabilization Act can be applied constitutionally to the sale of milk by the original producer to a distributor and in turn by the sale of that

distributor to the United States for use as troop rations or resale. The decision of the District Court from which this appeal has been taken was in the negative in both respects.

At the outset, we wish to call this Court's attention to the failure of the District Court in its opinion to discuss or explain how logic or precedent could conceivably justify its decision with respect to sales by dairy farmers to distributors which in every instance were negotiated and consummated at some distance from the military installations here involved. Yet the Court in its Memorandum Opinion makes it clear that it was at all times considering both the producer and distributor minimum price regulations. This is clear both from the body of the Opinion and the Order and Injunction subsequently issued pursuant to it.

The Solicitor General has contended that since the United States, after Appellants filed their Jurisdictional Statement and Consolidated intervened as amicus curiae, has now changed its procurement policy to permit the state to enforce minimum *producer prices*, this Court need no longer consider the constitutional question there involved. The proposal of the Solicitor General has not altered what is before this Court, which is an appeal from a decision of record of the United States District Court to the effect that California cannot constitutionally enforce either its producer or distributor minimum price regulations with respect to milk ultimately used on the military installations involved here.

Deletion of that portion of the order which restrains enforcement of minimum producer price regulations, as suggested by the Solicitor General, will not diminish the significance of the District Court decision as a precedent in the event that tomorrow Federal procurement officials elect to change Federal procurement policy once again. We call to the attention of the Court that the Solicitor General has not conceded that California can regulate producer prices over the objection of the Federal Government. Unless the decision of the District Court is reversed, it remains as a sword of Damocles poised over the heads of the milk industry.

A.

THE CALIFORNIA MILK STABILIZATION ACT AND MINIMUM PRICE PROGRAMS DO NOT IMPOSE A PROHIBITION UPON THE FEDERAL GOVERNMENT NOR DO THEY CONFLICT WITH FEDERAL POLICIES.

We respectfully submit that the District Court erred in declaring that the State of California (and, therefore, all other states) may not under the Federal Constitution, apply its milk stabilization programs to sales by dairy farmers to their distributors and by those distributors to certain military installations where the milk is used as troop rations and for resale. The rationale of the Court was that the state price regulations conflicted with Federal procurement policy and further that the State imposed direct penalties on the Federal Government and its officers if they purchased milk at less than the established prices.

We believe that the District Court placed a strained interpretation upon the act in finding that, under it California imposes penalties on the Federal Government if it purchases milk at less than the established minimum prices. We believe that it has misunderstood the Federal procurement policies with which it found the California milk stabilization to be in conflict. We further believe that in striking down a program which California has long considered to be essential for the health, safety and welfare of its residents, the District Court has disregarded the established policy of this Court that restraint must be exercised in finding an otherwise valid exercise by a State of its police powers to be violative of the Federal Constitution. This policy has been the very cornerstone of our Federal system of government in which both the Federal Government and the various state governments enact legislation for the health and welfare of the public to meet problems in our constantly changing and dynamic society.

1. The Milk Stabilization Program Does Not Impose a Prohibition Upon the Federal Government.

The Act makes the violation of any provision of it or of any stabilization and marketing plan or any order of the Director of Agriculture or of any of the unfair practices thereof a misdemeanor.[11] The District Court relied upon the italicized phrase in the following section of the California Agricultural Code for its conclusion that the Federal Government and

[11]California Agricultural Code, Sec. 4410.

its procurement officers as purchasers of milk from distributors at the various Federal military reservations were subject to criminal prosecution if they purchased milk at less than the established minimum prices:

> "4361. . . . no retail store, restaurant, confectionery or *other place for consumption on or off the premises* shall purchase from any distributor or sell to any consumer any fluid milk or fluid cream, or either of them, at less than the prices as established by the Director under the provisions of this Article. . . ." (Emphasis supplied.)

The Court then relies upon *California Commission v. United States*, 355 U.S. 534 (1958), as dealing with an analogous situation. It disposes of *Penn Dairies Inc. v. Milk Control Commission*, 318 U.S. 261 (1943), by suggesting that this Court overruled it in the *California Commission* case and, further, that, in any event, it is not applicable because the California Act "places a prohibition on the Federal Government" within the meaning of the *California Commission* case.

It is significant that the District Court reasoned that "the language of these Sections *is broad enough to include the Federal Government.*" (Emphasis supplied.) It could not find an express reference to the Federal Government because, in fact, none exists in the Act or the Minimum Price Regulations issued pursuant to it and which are pertinent here. It did not find that the State of California had in this or any other instance attempted to apply sanctions against the Federal Government or its agents because,

in fact, no such interpretation or application of the Act or the price regulations has ever been made.

In holding that the phrase "other place for consumption on or off the premises" included the Federal Government and its agents and made them subject to criminal sanctions of the State, the District Court imposed a strained interpretation upon the language of the Act in order to find it unconstitutional. It disregarded the fact that in the *California Commission* case, as distinguished from the instant case, there is *express* reference to the United States in the statutes there considered. It assumed that the California Legislature intended and sought by a "catch-all" clause to make military officers of the United States Government purchasing military supplies in the performance of their official duties subject to penal provisions of the State legislation.

The District Court also erred in adopting a construction of the Act from which it concluded that it was unconstitutional, when another interpretation to which it was readily susceptible would have led to the opposite result. *Sully v. American National Bank* (1900) 178 U.S. 289 at 300. It failed also to apply the principle that the entire scheme of the statute should be considered. *Savage v. Jones*, 225 U.S. 501 at 533 (1911).

The method by which the Director of Agriculture accomplished the purposes of the Milk Stabilization Act was to establish minimum prices at various sales levels. The incidence of the enforcement program fell upon the distributors. The program was not intended

to regulate the army nor did it in fact. The Supreme Court of the State of California has so construed the Act in *Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818 (1942), in which it duly noted that in an amicus curiae brief filed in behalf of the United States, the United States Attorney had contended that the application of the Act to sales of milk to the military would unduly burden the operation of an essential arm of the Federal Government:

> "The Act regulates not the army but the distributors who are independent contractors with the Federal Government. It is settled that such contractors are subject to State control, and that any consequent burden on the Federal Government is speculative and remote. . . . *James v. Dravo Contracting Company*, 302 U.S. 134" (page 829.)

There is no question but what the State of California has sought to make the established minimum prices applicable to sales of milk which ultimately reach the United States military installations. It sought to enforce these prices by action against distributors who disregarded the minimum prices in making sales to the military, not against the agents of the United States who made such purchases. In taking action against distributors to enforce the program, it did not discriminate between the United States Government and any other purchaser. The prices which the Director established as fair and reasonable were applied to all sales by distributors. In this respect, the military in purchasing milk for

its troops and for resale was paying no more than the other customers of those distributors.

Essentially, this is what the United States has taken exception to in this case. The military personnel have objected to the fact that if the distributors of fluid milk from whom they make their purchases are compelled to respect the minimum prices which California has made applicable to all sales in a marketing area, they would pay more for their milk than if an exception were carved into the program for their benefit. In effect, the armed forces feel that they should be entitled to the benefits of a healthy milk industry at the expense of the civilian population of California.

If the financial burden upon distributors of milk resulting from their observing minimum producer prices is in turn a burden upon the Federal Government, it is at most "a burden which is consequential and not one that is necessary, immediate or direct. . . ." *Trinity Farm Company v. Grosjean*, (1933) 281 U.S. 466.

The Pennsylvania Milk Control Law considered by this Court in the *Penn Dairies* case is substantially similar in purpose and method to the California Act. There too, as the Pennsylvania Supreme Court pointed out, incidence of the law falls upon the dealers, not the military:

> "The Milk Control Law is not directed against the Indian town gap reservation. If the objects of the law are realized, the reservation will benefit in common with the community in general . . .

there is no burden upon it which does not fall upon all users of milk, including institutions of this commonwealth. . . . no attempt is made in the law or in the order of the Board to give any order or direction to the reservation or its officers. The incidence of the law is upon the dealers of milk." *Penn Dairies v. Milk Control Commission*, (1942) 148 Pa. Super 261, 270-1.

This Court in its review of that case did not find the economic burden which the military there assumed to be a prohibition upon the Federal Government.

The essential difference between an indirect economic burden and a direct restraint which so impairs the functions of an arm of the Federal Government as to constitute a prohibition is illustrated by the *California Commission* case. There California, through its Public Utilities Code, provided that if the United States sought to negotiate rates for shipments of Federal property at below the established price schedule, it would be required to submit the proposed reduced rates to the discretionary authority of the state Public Utilities Commission. First, it should be noted that this legislation *clearly and expressly* referred to the United States. Secondly, this Court in its decision clearly pointed to the "seriousness of the impact of (the) regulation on the action of Federal procurement officials . . .":

"It is the practice of the Government not only to negotiate separate rates which vary from the class or 'paper weight' but also to negotiate a 'freight of all kinds' rate which will cover hundreds of diverse items for the supply of a divi-

> sion of the army or for a vessel that are needed at one place at one particular time. There is not provision in the California Code or Regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished.
>
> This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made. General Edmund C. R. Lasher testified at the trial 'for us to make these arrangements . . . let us say 48 states with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never find our way, we would never win the war.'" (pages 644 to 646.)

The difference between the burdensome restraints which the State sought to impose upon the military in the *California Commission* case and the indirect economic burden imposed upon the military in the *Penn Dairies* case, and in the instant case as well, is so striking that we are at a loss to understand how the District Court could conclude that the *California Commission* case is analogous and controlling here.

Finally, we contend that if the District Court was correct in interpreting the phrase "other places" to include the United States, it should have limited its finding of invalidity to an application of the Act to the United States or its agents.[12] The California legislature clearly contemplated a divisible statute. This is apparent from the consideration of the entire regulatory scheme since invalidity of enforcement against the United States and its agents would not interfere with the efficacy of the Milk Stabilization Programs promulgated under it so long as they could be enforced against producers and distributors.

2. The Minimum Price Regulations Do Not Conflict With Federal Procurement Policies.

It has long been settled that "in the application of the principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together." *Sinnot v. Davenport*, 22 How. 227, 243; *Reid v. Colorado*, 187 U.S. 137, 148 (1902).

In the *Penn Dairies* case, supra, this Court held that Pennsylvania pursuant to its Milk Control Act could establish the wholesale price of milk which distributors were bound to observe even though the purchaser was the United States Army. In so holding, this Court stated:

> "To establish such a conflict the Government places its reliance on acts of Congress requiring

[12] California Agricultural Code, Sec. 4420.

> competitive bidding in the purchase of supplies for the army . . . it is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish army supplies and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations and with the acceptance by government officers of the regulated price where that is the lowest. . . ." (pages 271-272.).

The California Milk Stabilization Act and the Pennsylvania Milk Control Act considered in the *Penn Dairies* case are similar.

In the instant case the Armed Forces Procurement Act in its competitive bid provisions do not purport to set aside these local price regulations of milk in California. The requirement for competitive bidding contained in 10 USC Sections 2301 to 2314 is no more contrary to the minimum price regulations of the California Milk Stabilization Act than the competitive bid requirements passed upon in the *Penn Dairies* case were to the Pennsylvania Milk Control Act. The Congressional history of the legislation indicates that it was intended to eliminate abuses in purchasing practices by the government and to assure the government of fair and reasonable prices.

Senate Report No. 571 states of the Armed Services Procurement Act of 1947:

> "This bill, as amended, provides for a return to normal purchasing procedures through the advertising bid method on the part of the armed services . . . it capitalizes on the lessons learned during wartime purchasing . . . a quote from the House report presents this concept of the bill and applies equally to the bill as amended . . . 'the bill represents a comprehensive revision and restatement of the laws governing the procurement of supplies . . . it holds to the time tested method of competitive bidding . . . it pulls within the framework of one law almost a century's accumulation of statutes and incorporates new safeguards designed to eliminate abuses, assures the government of fair and reasonable prices for supplies and services procured' . . ."[5]

As the Senate Report indicates, the law was designed to eliminate abuses in selling to the United States and to insure the government fair and reasonable prices. No question has been raised but what the minimum prices established by the California Director of Agriculture were fair and reasonable. Further, it would be ridiculous to contend that observance of state minimum prices for milk in procurement policy is an abusive practice with which the Congress was concerned.

In reversing its procurement policy after the instant litigation was commenced to the extent that California's minimum producer prices will be observed by military procurement officials, the United

[5] U.S. Code Congressional Service 1948, 80th Congress, 2nd Session.

States government has itself recognized the absence of any conflict between the California Milk Stabilization Programs and the Federal Procurement policies and procedures.

It is apparent that not only is there no conflict between the California Milk Stabilization Programs and the Military Procurement Acts which is direct and positive as required by *Reed v. Colorado*, supra, but neither is there any evidence either in the language of the Armed Services Procurement Act or in its legislative history to indicate that Congress intended to change the laws established in the *Penn Dairies* case.

In fact, Congress, under its powers to regulate interstate commerce, has attempted to stabilize the interstate milk industry by laws somewhat similar to those of California.[1] Under these laws, minimum prices are established through marketing agreements covering the sale of milk by producers. Where these marketing orders are in effect, procurement policy has been to recognize the established minimum prices for the milk.

California and its sister states are attempting to do on a local scale what the United States is attempting to do on a national scale, namely, to stabilize the milk industry by establishment of minimum prices.

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[1] 7 U.S.C. 601

B.

CALIFORNIA HAS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS FOR ENFORCEMENT OF MINIMUM DISTRIBUTOR PRICE REGULATIONS WITH RESPECT TO MILK DELIVERED TO THESE INSTALLATIONS.

The District Court herein has determined that the military bases in question are under the exclusive jurisdiction of the United States and thus the California Milk Stabilization Laws cannot be enforced.

The Solicitor General in his Memorandum for the United States (p. 7) states "This conclusion is, we think, not open to serious challenge", and further that there is no need for an examination of California statutes which "ex hypothesi, have only local application". These statements, and the Court's decision, are based primarily on an opinion of an earlier California Attorney General. (23 Ops. Cal. Atty. Gen. 14.)

We submit the opinion was manifestly in error and the position of the Solicitor General untenable since he relies on an opinion construing the very statutes which "need no review". (Memo U.S. p. 7.)

The United States may acquire *land* by purchase, condemnation or cession. Such acquisition of *title to land* does not, per se, give the Federal government "jurisdiction" over such land. The framers of our Constitution recognized the inherent dangers in the power of the Federal government to acquire land and provided for safeguards in the form of consent by state legislatures to such purchases, which consents can be limited and qualified. (*James v. Dravo Contracting Co.*, 302 U.S. 134.) Early enactments of

the United States Congress give note to this distinction, as in the Act of March 3, 1819, "Authorizing the sale of certain Military Sites" which provided that

> "the Secretary of War be . . . authorized . . . to cause to be sold, such military sites . . . as may become useless for military purposes, *and the jurisdiction which* has been specifically ceded . . . the United States by a State over such sites, shall hereafter cease."

Sharp divergence between acquiring title, and obtaining jurisdiction over lands, with a limitation or qualification to jurisdiction, is, and was when the bases involved here were acquired, the announced policy of the Congress. In 1940, Section 255 of Title 40, United States Code, provided:

> "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head . . . of any agency of the Government may . . . secure from the State . . . consent to or cession of such jurisdiction, exclusive or partial, . . . and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State *or in such other manner as may be prescribed by the laws of the state where such lands are situated.* Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired *as aforesaid* it shall be conclusively presumed that no such jurisdiction has been accepted." (Emphasis supplied.)

What, then, was the "manner prescribed by the laws of the state where such lands are situated" when

Travis, Castle and Oakland bases were acquired by the United States? Obviously, and contrary to the contention of the Solicitor General, this requires examination of California law.

The California statutes in question are set out in full in the Appendix, pp. 203-218, Brief for Appellants. These include Political Code 34 (1872), Government Code 111; Statutes of 1897, Chapter 56, page 51 (Gov. Code 114); the present more comprehensive procedure for acquisition of land, Government Code 126; and Statutes of 1891, Chapter 181, page 262 (Gov. Code 113).

Appellants have clearly and thoroughly given the history and construction of these statutes. (App. Brief pp. 81-148.) With these we are in complete agreement. The District Court in its opinion, however, had stated

> ". . . Stats. 1897, ch. 56, and its related Stats. 1891, ch. 181, p. 262, are 'cession" statutes, and are inapplicable to transfers of jurisdiction to the United States pursuant to the consent-to-purchase method provided in Art. I, Sec. 8, Cl. 17 of the Constitution."

As controlling authority, the Court quoted at length from 23 Ops. Cal. Atty. Gen. 14. We submit that the Attorney General's opinion was manifestly erroneous.

Brief Amici Curiae of the Dairy Industry of California, et al., Section II, concisely sets out the errors of the opinion. We think there is an additional and compelling reason for such conclusion.

The California Attorney General concluded that the 1872 statute "cedes jurisdiction", alleging that

the 1897 statute referred only to lands taken for military purposes "other than constitutionally designated" ones. This, we feel, was based not only on an erroneous reading of the authorities cited, but actually ignored the plain language of the statutes and the legislative intent behind their enactment.

Political Code 34 (1872) provided

> "The legislature consents to purchase . . . by the United States . . . for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings . . ."

This was almost the precise language of Art. I. Sec. 8, Cl. 17 of the Constitution requiring consent of the Legislature of the State

> "for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;" . . .

This was a comprehensive definition by the framers of the Constitution of *all* of the possible military purposes for which land might be used. The California Legislature in 1872 gave its consent to purchase for all such purposes. Thereafter the legislature in Statutes of 1897, Ch. 56, page 51 decided

> "The State of California hereby cedes to the United States . . . exclusive jurisdiction over all lands now held . . . for military purposes or defense, or which may hereafter be ceded or conveyed to the United States for such purposes . . . provided . . ."

Under the interpretation of the California Attorney General (23 Ops. 14), this statute actually has no meaning or effect. Although the phrase "non-consti-

tutional military purposes" is used, he does not recite any such purposes. We are aware of none, and cannot conceive of any. Both the makers of the Constitution and the California legislature in 1872 had already covered the complete military scope in their language.

That the California Attorney General was ignoring the obvious intention of the legislature in 1897 to *qualify jurisdiction* over all military lands is apparent from further reading of the statute. It referred to "all lands . . . which may hereafter be ceded or conveyed." This must, of necessity, since no other construction is possible, have been meant to cover all of the possible means by which *land* could be transferred to the United States for military uses. To "cede", in this context, is to transfer *territory* from one government to another. (*Goetz v. United States*, 103 Fed. 72.) This covered property owned by California and transferred by legislative act. "Conveyed" in both its dictionary and legal definition, simply means "transfer of title" (*Booker v. Castillo*, 154 C. 672) and covers all other transactions (i.e., purchase, gift, condemnation).

It should also be noted that the effect of the Attorney General's opinion is to set up two classes of military lands: one for non-constitutional military uses, requiring the filing of a map or plat as a condition precedent to federal jurisdiction, the other for constitutional military uses which requires no such filing. Even if there were lands which might fall within the first classification, one wonders what possible reason the California legislature would have had in making such a distinction in 1897.

We thus find that the Attorney General has by strained and illogical reasoning, ignoring the all-inclusive language of the Legislature relating both to military use of land and manner of transfer of title, arrived at a conclusion which, if it does not completely negate the 1897 statute, makes it inapplicable to every kind of military land we have knowledge of. The District Court, using that opinion as authority (which it should be noted is at variance with an earlier California Attorney General opinion—NS 3188 (1940)), has now effectively repealed the 1897 enactment.

All of the lands involved here were "conveyed" to the United States within the clear meaning of the 1897 Statute and its successors. Requisite plat filings were admitted, not made for Castle and Travis Bases. We submit that for the reasons given, here and in Appellants' and Amici briefs, the former Attorney General's opinion was wrong; and the District Court in error.

C.

THE DETERMINATION BY THE DISTRICT COURT THAT THE UNITED STATES HAD EXCLUSIVE LEGISLATIVE JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS IS NOT A VALID BASIS FOR DENYING TO CALIFORNIA THE AUTHORITY TO ENFORCE MINIMUM PRICES APPLICABLE TO SALES AND DELIVERY OF MILK BY PRODUCERS TO DISTRIBUTORS WHEN BOTH OF THE PARTIES WERE LOCATED AND ALL ASPECTS OF THE TRANSACTIONS OCCURRED COMPLETELY OUTSIDE OF SUCH RESERVATIONS.

In the preceding discussion, we have limited our argument to the effect of the determination of the

question of whether California has jurisdiction over the military reservations involved here upon the enforceability by California of its minimum *distributor* prices. However, the District Court below, when it made its determination that California did not have jurisdiction over these lands, concluded that, therefore, neither *producer* nor *distributor* minimum prices for milk could be enforced.

It was clear from the evidence before the Court that the minimum producer prices were applied to producers and distributors located entirely outside the military reservations and further that sale and delivery of the milk was made entirely outside of the reservations.

Yet the District Court did not discuss, much less cite authority, for its unprecedented decision that Article I, Section 8, Clause 17 of the United States Constitution denied to California the right to enforce its minimum producer prices.

The interpretation of the words "exclusive legislation" as they are used in Article I, Section 8, Clause 17 of the Constitution does violence to their plain meaning, to their interpretation by this Court, and to the Constitutional concept of a Federal system of government.

We suggest that this extension of the application of this Constitutional provision resulted from some inadvertent confusion with issues raised by the Supremacy Clause (Article VI, Clause 2). For whatever may be the reason, the District Court so decided and we urge it was in error and should be reversed.

CONCLUSION

For the reasons set forth in the Appellants' brief and those upon which we have placed special emphasis in this brief, we urge this Court to make a final determination that it does have jurisdiction over this litigation and, further, that the decision of the District Court be reversed to the end that the State of California may continue to protect the health and welfare of its residents, including military personnel, by enforcement of minimum price regulations applicable to the sale of milk by producers and distributors.

Dated, San Francisco, California,
August 21, 1962.

Respectfully submitted,
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. [illegible]

CHARLES PAUL [illegible], Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion and findings of the District Court for the Northern District of California, Southern Division, are reported in 190 F. Supp. 645. By order dated March 27, 1961, this memorandum opinion was adopted

as sufficient to constitute the findings of fact and conclusions of law in the action. R. 648.

JURISDICTION

These suits were brought under 28 U.S.C. 1331 and 1345 to enjoin the enforcement of the California milk stabilization act (Ch. 17, Div. 6, Calif. Agr. Code) as unconstitutional as (1) imposing a prohibition on the federal procurement function and (2) as applied to contractors making delivery of milk to areas subject to exclusive federal jurisdictions. R. 7-13, 178-183, 191-196. The trial court granted the relief requested and permanent injunctions of the three-judge district court were entered on April 19, 1961. R. 6, 166. Notice of appeal to this Court was filed in the district court on April 26, 1961. R. 6, 166, 669-672. By order entered June 7, 1961, the district court extended appellant state officers'[1] time for docketing the appeals and filing the record on appeal with the Clerk of the United States Supreme Court to July 24, 1961. Appendix p. 159. State officers' Jurisdictional Statement and the record on appeal were docketed with the clerk of this Court on July 19, 1961. The Court by order entered January 15, 1962, postponed consideration of the question of jurisdiction until a hearing of the cause on the merits. 368 U.S. 965. The order also requested that counsel brief and argue, in addition to the merits, the

[1] Appellants are Charles Paul, Director of Agriculture, and Stanley Mosk, Attorney General of California, cited herein as "state officers."

question of the Court's jurisdiction on direct appeal under 28 U.S.C. 1253. 368 U.S. 965 (1962).

Jurisdiction of the Court on direct appeal under 28 U.S.C. 1253 hinges on whether the government's complaint required the convening of a three-judge district court under 28 U.S.C. 2281. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 75 (1960); see *Ex parte Hobbs*, 280 U.S. 168, 172 (1929). A three-judge district court is to be convened under 28 U.S.C. 2281 (formerly Judicial Code, Sec. 266, 36 Stat. 1162) only if an injunction is sought restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." This phrase requires that there must be ". . . an asserted conflict with the Federal Constitution . . . ." *Louis. & Nash. R.R. Co.* v. *Garrett*, 231 U.S. 298, 304 (1913). See *Ex parte Bransford*, 310 U.S. 354, 361 (1940). A case in which the complaint seeks to enjoin enforcement of a state statute on substantial grounds of federal unconstitutionality is one required to be heard by a district court of three judges, even though nonconstitutional grounds of attack upon the statute are also alleged in the complaint. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960).

The government's complaints in the court below sought on two grounds to enjoin enforcement of the California milk stabilization act as applied to milk delivered on three federal military installations. First, the government alleged in its complaint in action No. 39030 that the state milk stabilization laws, as applied

to contractors delivering milk to the Oakland Army Terminal, were unconstitutional "in that they place an unreasonable and unconstitutional burden and impediment to the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 11 through 17, inclusive; Article II, Section 2, Clause 1; and Article IV, Section 3, Clause 2, of the Constitution of the United States." R. 8. Virtually the same word for word allegation of unconstitutionality of the state milk laws is alleged in the government's complaint in action No. 39073 with respect to milk delivered to Castle and Travis Air Force Bases. R. 178, 191. These assertions of conflict between the state milk stabilization act and the war and supremacy clauses of the federal Constitution assert the "unconstitutionality" of the state law within 28 U.S.C. 2281, just as the allegation in the government's complaint in *Query* v. *United States*, 316 U.S. 486 (1942) that enforcement of a South Carolina excise tax to Army Post Exchanges in their sales of tobacco, playing cards, soft drinks and similar items would be "contrary and repugnant to the provisions of the Constitution of the United States and in interference with the activities of the United States Government . . ." asserted the "unconstitutionality" of the state statute under former Judicial Code Section 266. *Query* v. *United States*, 316 U.S. 486, 487 (1942); Transcript of Record, *Query* v. *United States*, Supreme Court of the United States, October Term 1941, No. 619, pp. 3-4.

[2] Constitution Article I, Section 8, clauses 3; 11-16

The government's allegations of unconstitutionality in their complaints in the instant causes are virtually the same as the allegations in the government's complaint in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). In the *Calif. Comm'n.* complaint, the government alleged that California Public Utilities Code, Section 530, placed "an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, clauses 7, 12, 13, 16, 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States." Transcript of Record, *Calif. Comm'n. v. United States*, Supreme Court of the United States, October Term 1957, No. 23, pp. 6-7. Without discussion, the Court held that the complaint raised an issue of unconstitutionality under 28 U.S.C. 2281 which gave the court appellate jurisdiction over the direct appeal. *Calif. Comm'n. v. United States*, 355 U.S. 534, 536 (1958).

In *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943), the appellant United States took the position that the Pennsylvania wholesale milk price regulations were unconstitutional arguing:

> "But even if we assume that the state price regulation is formally addressed to the milk dealer alone, nevertheless direct interference with the federal function is its inescapable legal concomitant." Brief For The Appellants, *Penn. Dairies, Inc. v. Milk Control Comm'n.*, Supreme Court of the United States, October Term, 1942, No. 399, pp. 13-14.

Mr. Chief Justice Stone at the outset of his opinion for the Court stated: "Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law . . . may constitutionally be applied to the sale of milk by a dealer to the United States. . . ." 318 U.S. 261, 266. The constitutional issue mentioned by Mr. Chief Justice Stone was the government's argument that the state law unconstitutionally impaired a federal function, that is, procurement. This constitutional issue, then, gave the Court appellate jurisdiction of the direct appeal from the Supreme Court of Pennsylvania under Judicial Code, Section 237, now 28 U.S.C. 1257(2). 318 U.S. 261, 268. The phrase "repugnant to the Constitution" in Judicial Code, Section 237, 36 Stat. 1156, is equivalent, under the issues posed here, to the words "unconstitutionality of such statute" in 28 U.S.C. 2281, the controlling appellate jurisdiction statute in this case. The same constitutional issue concerning a similar state milk control statute was before the Court in *Penn Dairies*, and as in that case, the Court has appellate jurisdiction of the appeal in this case.

The government's claim in this case that the state statute constituted an unconstitutional interference with a federal function was pressed in the trial court, the government arguing: "That by enforcement of the California minimum milk price statute defendants are attempting to interfere with a federal function . . . and that such attempted interference is prohib-

ited by the Supremacy Clause of the United States Constitution (Article VI, clause 2)." R. 169. The district court found that a constitutional issue was posed by the government's position that enforcement of the state statute "violates the right of the plaintiff to be free from state interference in the exercise of a federal function under the Supremacy Clause, Art. VI, clause 2, of the United States Constitution." 190 F. Supp. 645, 648.

In its memorandum in response to Jurisdictional Statement, filed in this Court, the government stated that it will argue in its brief on the merits ". . . that the California milk act is unconstitutional insofar as it compulsorily applies to distributor sales to the federal government because it prohibits, on threat of criminal and civil penalties, federal procurement officers from purchasing milk at less than the state-established minimums under the Armed Services Procurement Act and regulations issued thereunder." (Gov't. Br., 6, fn. 5.) Therefore, a case is presented "in which the injunction may be granted on grounds of federal unconstitutionality" so that the case comes within the three-judge requirements of 28 U.S.C. 2281. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 76-77 (1960). The provisions of the Pennsylvania milk stabilization act, similar to California's statute, were held in *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, to be compatible with the policy expressed in the federal procurement statutes. These procurement statutes, although codified into 10 U.S.C. 2301

et seq., remain in effect today. The Supreme Court of California has held that California's milk stabilization act, like the similar acts of Pennsylvania and Massachusetts, does not apply to the United States or its instrumentalities. *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830, rev'd. on another ground, 318 U.S. 285; *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 441, 445, affirmed 318 U.S. 261; *Milk Control Board* v. *Gorselini Dairies, Inc.*, 301 Mass. 174, 16 N.E. 2d 641; 643. Therefore, no substantial question of statutory interpretation is presented on the procurement policy issue in the case, which instead poses the immediate constitutional issue whether the state's milk stabilization act is valid under the Supremacy Clause of the Constitution. *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962). The convening of the three-judge court under these circumstances, followed the familiar pattern of such cases as *Calif. Comm'n.* v. *United States*, 355 U.S. 534 (1958); *Query* v. *United States*, 316 U.S. 486 (1942), and *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), where state statutes were challenged as an unconstitutional interference with a federal function. This Court, therefore, has appellate jurisdiction of the case under 28 U.S.C. 1253.

For a second ground of unconstitutionality, the government alleged in their complaints that state officers "are precluded by the Federal Constitution from regulating prices of milk sales to the United

States where the sales and deliveries are made in an area subject to the exclusive jurisdiction of the United States." R. 7, 178, 191. This claim of unconstitutionality, as understood by state officers, is based on two propositions: First, the government asserts that a state statute (Calif. Gov. Code, Sec. 111, formerly Political Code, Sec. 34) which is not in the form of a cession of jurisdiction, but which consented to the federal purchase of land for military purposes, has the same legal effect as a state statute which makes an express cession of jurisdiction. Second, if not, then Government Code, Section 111, granted state consent to the exercise by Congress of the power to exercise exclusive legislation over the land so purchased under Constitution Article I, Section 8, clause 17. And it is asserted, this power in Congress to exercise exclusive legislation is *per se* exclusory of state law, even where Congress has not exercised this power.

State officers in their answers and briefs, disagree with the first proposition since a state consent to the purchase of land for military purposes by the United States, without an express cession of jurisdiction, does not constitute a surrender of state sovereignty over the land. R. 156, 183, 197, 657, 661. *Wilson v. Cook*, 327 U.S. 474, 486 (1946). State statutes which have been held to bring land within exclusive federal jurisdiction were statutes which made express cessions of jurisdiction. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 528 (1885); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930); *United States v. Un-*

cuta, 281 U.S. 138, 141 (1930). Political Code, section 34 (Government Code, section 111), is not cast in the form of a cession, and, therefore, does not make a cession of exclusive jurisdiction. Secondly, state officers assert that clause 17 is not *per se* exclusory of state laws regulating local matters except as this power is implemented by Congress. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937).

Thus, the immediate constitutional issue posed by the government is whether a state consent statute which is not in the form of a cession was effective to transfer exclusive jurisdiction to the United States by virtue of Constitution Article I, Section 8, clause 17.

In summary, the government's complaints sought injunctions against enforcement of the California statute on grounds of federal unconstitutionality under the War and Supremacy clauses and under Article I, Section 8, clause 17 of the Constitution. These allegations required the convening of a three-judge district court under 28 U.S.C. 2281, and this Court has jurisdiction of these direct appeals under 28 U.S.C. 1253. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 74-75 (1960); *Calif. Comm'n.* v. *United States*, 355 U.S. 534, 536 (1958); *Query* v. *United States*, 316 U.S. 486 (1942); *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 295 (1943).

QUESTIONS PRESENTED

1. Delivery of fresh milk is made to three military installations in California principally for resale

through commissaries, post exchanges, officers' and non-commissioned officers' clubs (70%) and partially for troop ration (30%). Does the enforcement of the California milk stabilization act against producers and distributors, with respect to milk purchased by distributors from milk producers and then delivered by such distributors to the three military installations, constitute an unconstitutional interference with the performance of a governmental procurement function exercised under the federal procurement statutes 10 U.S.C. 2301 et seq.?

2. California by statute in 1872 consented to the purchase or condemnation of land by the United States for military purposes and in 1897 tendered "to the United States exclusive jurisdiction over all lands . . . now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may thereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the lands are situated." (Sec. 34, Pol. Code; Stats. 1897, Ch. 56, p. 51 [Calif. Gov. Code, Secs. 111, 114].) Did the United States obtain exclusive jurisdiction over the parcels at Travis Air Force Base and over a civilian housing tract at Castle Air Force Base where the United States failed to file metes and bounds descriptions and plats for the parcels at Travis and Castle in the appropriate county recording office?

3. The United States Secretary of the Army gave written notice that the Department of the Army "hereby assents to the acceptance of federal jurisdiction" over certain parcels at the Oakland Army Terminal "upon and subject to each and all of the conditions and reservations prescribed in said California Government Code section 126. . . ." At the time of such notice, section 126 Government Code, reserved various state powers "in addition to any other conditions or reservations prescribed by law." At the time of such notice, Section 113 Government Code reserved "the administration of the criminal law of the state with respect to any land over which any jurisdiction . . . may be ceded or conveyed to the United States. . . ." Did California make a cession of exclusive jurisdiction over these parcels at Oakland to the United States?

4. Did the district court err in permanently enjoining enforcement of the California milk stabilization act as unconstitutional without trial and on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073), where the pleadings and affidavits raised issues of material facts?

5. Did the district court err in failing to abstain from final decision pending construction by the California Supreme Court of the California milk stabilization act and the California statutes relating to the

acquisition of land and jurisdiction by the United States, and in enjoining appellant state officers from proceeding in pending state court actions?

STATUTES INVOLVED

UNITED STATES:

Constitution of the United States, Article 1, Section 8, clause 17; 10 United States Code, sections 2301-2314; Lanham Act, 54 Stat. 1125; Section 355, Revised Statutes of the United States, as amended, Act of October 9, 1940, 54 Stat. 1083.

CALIFORNIA:

Agricultural Code, Chapter 17, Division 6; Government Code, sections 111, 113, 114, 126; Political Code, section 34, as amended Stats. 1939, Ch. 710, p. 2231; Statutes of 1897, Chapter 56, p. 51.

Copies of relevant portions of these statutes are set forth in the Appendix at pages 160 and 176.

STATEMENT

I. THE LITIGATION BELOW

This is an appeal by the Director of Agriculture and the Attorney General of California (appellants) from the judgments (R. 666, 668) of a three-judge district court entered on motion for summary judgment (District Court No. 39073) and for preliminary injunction (District Court No. 39030) which found that the California milk stabilization act was unconstitutional as applied, and which permanently enjoined appellants from enforcing in pending state court actions the state minimum milk producer and minimum

wholesale price regulations with respect to milk purchased by distributors from milk producers and then delivered by the distributors to officers' clubs, post exchanges, commissaries and mess halls located at three military installations located in California.[3] R. 150, 550, 655-656, 790. Appellants in the trial court had filed timely objections to the motions for summary judgment and for preliminary injunction (R. 341-495; 355-356, 554-556), and had requested a stay in order to obtain a pre-trial discovery and that the case be tried on the merits. R. 341-342, 524-525, 554-556, 584. The request was denied and all evidence was presented in summary fashion through affidavits. 190 F. Supp. 645, 659-660. Appellees' motions for summary judgment in action No. 39073 were filed April 14, 1960 (Count I, Travis; R. 167) and on April 18, 1960 (Count II, Castle; R. 208). Appellees' motion for preliminary injunction in action No. 39030 (Oakland) was filed March 30, 1960. R. 15. Oral argument on the motions in both actions were heard on April 26, 1960 and were on that date ordered submitted for decision. R. 2, 162.

The trial court found that exclusive jurisdiction had passed to the United States over the 18.36 acre civilian housing tract at Castle, and over all the parcels at Travis, on the ground that the California Legislature by giving consent to the federal "purchase or condemnation" of land within the State for military purposes, had thereby ceded exclusive jurisdiction

[3] Castle Air Force Base (Castle), Travis Air Force Base (Travis) and Oakland Army Terminal (Oakland).

to the United States. 190 F. Supp. 645, 652-653. Government Code, section 111, formerly 1872 Calif. Political Code, section 34.[4]

The district court also found that the California State Lands Commission by consenting "to the acquisition by the United States of land within this State" had ceded exclusive jurisdiction to certain parcels of land at Oakland by construing the reservations of state, civil and criminal jurisdiction set forth in sections 113 and 126, California Government Code, to be inapplicable. 190 F. Supp. 645, 649-652. By reason of its conclusion that Travis and Oakland, and one parcel at Castle, lie within exclusive federal jurisdiction, the district court held the state minimum milk producer price regulations and the state minimum wholesale price regulations were unconstitutional as applied to producers and distributors with respect to milk delivered to the three installations. 190 F. Supp. 645, 660.

As an alternative ground for its decision, the trial court found that application of the state minimum milk price regulations to producers and distributors with respect to milk delivered to Castle, Travis and Oakland, would unconstitutionally impair a federal function "because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the Public Utilities case, . . . and, therefore, it conflicts with federal procurement

[4] Government Code, section 111, and 1872 Political Code, section 34, as amended by Stats. 1939, Ch. 710, p. 2231, are set forth in the appendix at pp. 203, 204.

statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2." 190 F. Supp. 645, 647.

The California milk stabilization act, Calif. Agr. Code, Div. 6, Ch. 17, was enacted in 1935 to eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of milk. Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42; Stats. 1937, Ch. 413, p. 1342, and Stats. 1937, Ch. 710, p. 1988. Pursuant to this act, the Director has established (1) minimum producer prices at which dairy farmers may sell and distributors may purchase milk, and (2) minimum wholesale prices at which distributors may sell milk. R. 393-468.

Prior to December 1, 1960, California milk producers were receiving, as required by state law, the state established minimum milk producer prices for milk sold to distributors. R. 655-656, 683. In disregard of state law, certain milk producers marketed their milk through three distributors who processed and delivered the milk to federal commissary stores, officers' clubs and to troop messes at prices below the state established minimums. R. 517-523, 769-788. For example, Milk Producers Association of Central California, a California corporation (R. 151, 746, 791), underpaid dairy farmers the amount of $1,099,139.00 for the period December, 1958 to February, 1960. R. 518. Approximately 35% of this underpayment was due to low returns from sales to the United States. R. 519-520.

In early 1960 appellants filed actions against these three milk distributors, charging that milk producers had not been paid the minimum milk producer prices (R. 744, 756, 769) and that sales had been made by such distributors at prices below the established wholesale minimum prices. R. 150, 550, 792-793. The United States then brought the present actions in the United States District Court for the Northern District of California, Southern Division, to restrain the Director of Agriculture and Attorney General of California from enforcing in these state proceedings either the minimum milk producer price regulations, or the minimum wholesale milk price regulations against distributors delivering milk to the Castle, Travis and Oakland commissary officers. R. 7-12, 178-183, 194-196. The same distributor, Milk Producers Association of Central California, then held the milk contracts for all three bases. R. 27, 173, 244. Out of nine bidders at Castle, this distributor was the only one offering to deliver milk at prices below the state established minimums. R. 246. At the time the government's complaints were filed, Milk Producers Association of Central California was delivering milk to Travis at the allowed minimum wholesale milk price, less the 12¢ price discount allowed for volume sales to state and federal installations, and was delivering to Castle and Oakland at a lesser price than the state fixed minimum wholesale price, less discount. R. 27, 174, 246.

A break in the prices paid by California distributors to milk producers for milk purchased for processing and sold to federal agencies occurred, immediately after the memorandum decision holding the state act unconstitutional as applied was entered by the trial court on November 29, 1960. R. 558. This drop in price was from the state minimum milk producer price of $5.19 per hundred weight for 3.5% milkfat milk to $2.75 per hundred weight, a price below the costs of production. R 683-685. This latter price is well below the federal Department of Agriculture support price of $3.40 per hundred weight for 3.8% milkfat milk utilized for milk by-products. R. 684; 26 F.R. 2822, as amended 26 F.R. 7255. This loss to the California dairy farmer, when projected on annual federal purchases of 29,057,000 gallons (R. 348), amounted to not less than $6,900,000.00. R. 684. Milk purchased for resale through commissaries, constitutes the bulk of all milk purchased at the Castle, Travis and Oakland reservations. R. 543, 544, 545, 547, 548, 549, 643, 645, 646. The percentages purchased for such resale were respectively 73%, 64.5% and 78%. R. 643, 645, 646. These commissaries are required to operate without expense to the government. Sec. 613, 1959 Department of Defense Appropriation Act, 72 Stat. 711, 725; Sec. 613, Department of Defense Appropriation Act, 1960, 73 Stat. 366, 380; Sec. 513, Department of Defense Appropriation Act, 1961, 74 Stat. 338, 351; Sec. 613, Department of Defense Appropriation Act, 1962, 75 Stat. 365, 377. R. 634. The principal beneficiaries of the

break in prices to milk producers occasioned by the decision of the trial court were therefore the patrons of the commissary stores who were able to purchase milk at about one-half the price charged at nearby competing private retail stores, e.g. .22 v. .46½ per ½ gal. R. 420; 635, 687.

II. PARCEL ACQUISITION AND PROCUREMENT HISTORY FOR THE CASTLE, TRAVIS AND OAKLAND INSTALLATIONS.

A. Introduction.

The purchases of milk for resale at the commissaries and for troop ration at Castle, Travis and Oakland are made with appropriated funds and are governed by the armed services procurement statutes, 10 U.S.C. 2301-2314. R. 634, 643, 644, 646. Under an agreement between the Commodity Credit Corporation and the United States Army Quartermaster Corps, acting for all military agencies, the Commodity Credit Corporation pays 8.12c per quart towards the cost of milk issued for troop ration in excess of the 8 ounce ration. United States Dept. of Agriculture bulletin 2179-61, July 12, 1961.[5] These payments are paid from appropriations augmenting the Agricultural Act of 1949, 63 Stat. 1051, as amended by the Agricultural Act of 1954, 68 Stat. 897, 900.

On the other hand, the purchases of milk for resale at the post exchanges, officers' clubs, non-commissioned officers' open messes and post restaurants are made

[5] U.S. Dept. of Agr. bulletin 2179-61, July 12, 1961, is set out in the appendix at p. 219.

from non-appropriated funds (see Sec. 623, National Military Establishment Appropriation Act, 1950, 63 Stat. 987, 1022; R. 643, 645, 647), and are not governed by the armed services procurement statute, 10 U.S.C. 2303(a). The operations of these military post exchanges, officers' clubs, non-commissioned officers' open messes and post restaurants, when located on military installations, are governed by administrative regulation of the defense departments. See Sec. 20, Act of July 15, 1870, 16 Stat. 315, 319; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 393 (1944).

B. Castle Air Force Base.

Castle Air Force Base, totaling 2,376 acres in area, is located in Merced County, California. R 380, 383-387. The base proper was successively acquired by the purchase and condemnation of separate parcels of land from private land owners between June 20, 1946 to June 11, 1956 (R. 352, 383-387), excepting the parcel of 18.36 acres located outside the main entrance gate to Castle which was acquired for civilian housing purposes on July 17, 1943. R. 349, 385. This parcel was acquired pursuant to the Lanham Act, 54 Stat. 1125, which expressly provides that federal acquisition of land under the statute should not deprive a state of jurisdiction over such land. R. 229, 233, 381.

Bid invitations for milk to be purchased with appropriated funds originate from the Base Procure-

ment Office (R. 244) to persons on a "bidders list." R. 248. Bid proposals are then returned by bidders to the procurement office. R. 248. The contracting officer at Castle lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 248, 272, 338. Since the contracts at Castle exceeded $25,000 (e.g., $459,906.00; R. 251), the offers of contract to sell to the government are accepted in writing by higher military authority not located at Castle. R. 248.

Resale of milk purchased from nonappropriated funds at Castle is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Base Post Exchange	#12 - R. 385, 643	3 17 47. R. 643
Base Officers' Club	#12 - R. 385, 643	3 17 47. R. 385, 643
Base Non-commissioned Officers' Open Mess	#12 - R. 385, 643	3 17 47. R. 385, 643

Prior to February 15, 1960, delivery of milk purchased for resale from appropriated funds was made to the Base Commissary located on Parcel 12 at Castle. R. 385, 642. Title to parcel 12 was acquired by the United States by deed from the City of Merced on March 17, 1947. R. 643. Similarly, prior to February 15, 1960, delivery of milk purchased from appropriated funds for troop ration was made to Parcel 12 at Castle. R. 643.

Appellants on February 5, 1960, filed suit in the state courts to enforce the California milk stabiliza-

tion act against the contractor delivering milk to Castle. R. 790. Ten days later, on February 15, 1960, the government directed the contractor to cease making delivery of milk to buildings located on Parcel 12, and to deliver the refrigerated trailer of milk to the 18.36 acre civilian housing tract located just outside the base proper. R. 350-351, 363, 385, 642-643. A government tractor, driver by Air Force personnel, then hooks onto the loaded trailer and delivers the milk to buildings located on Parcel 12. R. 350-351, 363, 385, 642-643.

C. Travis Air Force Base.

Travis Air Force Base, totaling 4131 acres in area, is located in Solano County, California. R. 805-817. The base was acquired by successive purchase and condemnation of separate parcels of land from private landowners between September 4, 1942 to June 17, 1958. R. 805-817. Bid invitations for milk to be purchased with appropriated funds originate from the Base Procurement and Contracting Office (procurement office) and are sent to persons on a "bidders list." R. 821, 825-832. Bid proposals are then returned by bidders to the procurement office. R. 822. The contracting officer at Travis lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 822. Since the contracts at Travis exceeded $25,000 (e.g., $500,365.90, R. 834), the offers of contract to the government are manually accepted in writing by

higher military authority not located at Travis. R. 800, 850, 856. Notices of bid award are thereafter given from the Travis procurement office. R. 822.

Delivery of milk purchased from non-appropriated funds for resale at Travis is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Base Post Exchange	#18-A—R. 644-645, 849	1 23 43 R. 806
Base Officers' Club	#47—R. 644-645, 849	5 11 46 R. 806
Base Noncommissioned Officers' Open Mess	#16—R. 644-645, 849	3 1 43 R. 806

Delivery of milk purchased from appropriated funds for resale at Travis is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Commissary	#18-A—R. 849	1 23 43 R. 806

Delivery of milk purchased from appropriated funds at Travis for troop ration is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Dining Hall #6; Dining Hall #7; Bldg. #381	#49—R. 991	5 26 46 R. 806
Dining Hall #1	#17-A—R. 849	1 22 43 R. 806
Inflight Kitchen; Dining Hall #2; Nursery	#16—R. 849	5 1 43 R. 806
3083 Mess Hall	#13—R. 849	2 23 43 R. 805
Cold Storage	#7—R. 849	12 4 42 R. 805

D. Oakland Army Terminal.

The Oakland Army Terminal, consisting of 478.6 acres owned by the United States and 122.4 acres of leased land, is located within the City of Oakland, California. R. 639. Title to the 478.6 acre area, consisting of tracts A-114, B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306 was acquired by purchase and condemnation between January 15, 1941 to September 11, 1953. R. 442, 809; appendix pp. 231, 232. Tracts A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, A-131, A-115-2 and A-119-2 are leased. R. 149, 639.

Bid invitations for milk purchased from appropriated funds for delivery to the Oakland Army Terminal originate from the Procurement Division, United States Army, Fort Mason, San Francisco, California, (R. 30, 117) and are sent to persons on a "bidders list." R. 28. The offers of contract to sell to the government are accepted in writing at Fort Mason. R. 30. The contract with Milk Producers Association of Central California provided for delivery of milk dispensing machines to the Enlisted Men's Mess at Fort Mason, San Francisco, at anti-aircraft missile sites in San Francisco, Coyote Hills (near Coyote), at Alvarado, California (near Hayward), and for the delivery of milk to the commissary officer at the Oakland Army Terminal. R. 34, 35.

Delivery of milk purchased from non-appropriated funds is made at Oakland at the following points:

Building	*Parcel Number*	*Land Interest*
Terminal Post Exchange	B-210, R. 647	Title acquired by deed, March 2, 1942. R. 369, 639
Terminal Officers' Club	A-119, R. 647	Parcel is leased. R. 149, 639
Terminal Post Exchange Restaurant	B-210, R. 647	Title acquired by deed, March 2, 1942. R. 369,639

Delivery of milk purchased from appropriated funds for resale at the Terminal Commissary and for troop ration is made at Oakland on Parcel B-210, R. 34, 639, 646. Title to Parcel B-210 was acquired on March 2, 1942. R. 369, 639.

III. CALIFORNIA AND FEDERAL ACTION RELATIVE TO CESSIONS OF JURISDICTION.

A. Castle and Travis Air Force Bases.

Section 355, Revised Statutes, as amended by the Act of October 9, 1940, 54 Stat. 1083, provides:

> ". . . it shall be conclusively presumed . . . that jurisdiction has not been accepted by the United States unless exclusive or partial jurisdiction were accepted . . . by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated."

Pursuant to this statute, the United States Secretary of War sent to the Governor of California no-

tices that ": . . the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States. . . ." Letters dated April 16, 1943 (R. 374) and January 3, 1944. R. 339. In addition, the Secretary of War on March 14, 1944, sent to the Governor of California a list of military installations within the state boundaries. R. 215-222.

From March 2, 1897, to September 19, 1947, California had in force a statute ceding "exclusive jurisdiction" over all lands within the state "ceded or conveyed" to the United States for military purposes provided that "A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Sec. 114, Calif. Gov. Code, codified by Calif. Stats. 1943, Ch. 134, p. 898, from Calif. Stats. 1897, Ch. 56, p. 51.

The government concedes that it has never complied with the parcel description and plat filing requirements of Section 114, Government Code, and the predecessor 1897 Statute, with respect to either the Castle or Travis reservations. Gov't. Br. 9; R. 349-350, 352-353, 643, 644, 646. The government further concedes that it has never made application to the California State Lands Commission for state consent to purchase land for military purposes at Castle and Travis. R. 644.

B. Oakland Army Terminal.

On April 21, 1949, the Secretary of the Army gave written notice to the Governor of California that the government had acquired 478.75 acres of land at the Oakland Army Terminal in Alameda County. R. 372. The notice further stated that jurisdiction of this acreage was accepted by the United States pursuant to Section 355, Revised Statutes of the United States "subject to each and all of the conditions and reservations prescribed in . . . Section 126, Government Code." R. 372.

This notice of April 21, 1949, did not comply with state procedure (R. 137, 372), and by letter of July 5, 1950 (R. 368), the Secretary of the Army filed an application requesting that the California State Lands Commission hold a public hearing to determine if the federal acquisition of the lands was in the public interest. R. 368-370. This notice also stated that the United States "assents to acceptance of federal jurisdiction over the subject land" . . . upon and subject to each and all of the conditions and reservations prescribed in said California Government Code Section 126, as follows: "The State reserves . . . the entire power of taxation . . . and reserves to all persons residing on such land all civil and political rights . . . which they might have were the consent of the State not given." R. 370. The described parcels of land included tract A-114 (excluding the 123.33 acres acquired 9/11/53; Appendix p. 231. R. 141-148) and tracts B-206, B-209, B-210, B-211, B-220, B-222, C-300,

C-302, C-305 and C-306, R. 99. After a public hearing, the State Lands Commission on October 5, 1950, entered its resolution finding "that the conditions prescribed in subdivisions (a), (b) and (c) of Section 126 of the Government Code of the State of California have been found to have occurred and to exist and that such acquisition is in the interest of the State." R. 140-148. On the date of this resolution, Section 126, Government Code (Calif. Stats. 1947, Ch. 1532, p. 3163), provided:

> ". . . the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law:*
>
> "(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and *subject to each and all of the conditions and reservations in this section prescribed;*
>
> "(e) In granting the consent, the Legislature and the State reserve . . . the State's entire power of taxation . . . ; and reserve to all persons residing on such land all civil and political rights . . . which they might have were this consent not given." (Emphasis added.)

In the same bill that amended Government Code Section 126, to give administrative control to the State Lands Commission, the 1947 California Legislature amended Government Code Section 113, to reserve

". . . the administration of the criminal laws of the State with respect to any land over which any jurisdiction . . . may be ceded or conveyed to the United States. . . . " Calif. Senate Bill 656, 1947 Calif. Legis. Sess., enacted as Stats. 1947, Ch. 1532, p. 3163.

The trial court found that this reservation of criminal jurisdiction was "applicable only to lands 'ceded' to the United States, as distinguished from lands acquired through purchases or condemnation" with state consent. 190 F. Supp. 645, 651. From this premise, the district court concluded that exclusive jurisdiction over the lands at Oakland had been ceded to the United States by virtue of Section 126. 190 F. Supp. 645, 652. Judgment was then entered on the government's motion for preliminary injunction permanently enjoining as unconstitutional enforcement of the California milk price regulations as applied to milk purchased by distributors from milk producers, and then delivered by milk distributors to the government at the Oakland installation. R. 666.

As previously noted, some of the parcels at Oakland are owned by the government and some are leased. App. Br. *supra*, p. 24. Title to those parcels which are owned were acquired between January 15, 1941 and September 11, 1953. R. 442, 809; Appendix p. 231. The government concedes that it has never recorded metes and bounds descriptions and a plat for any of these parcels as required by California Statutes of 1897, Chapter 56, page 51, or its codified successor, Government Code, Section 114. R. 646.

SUMMARY OF ARGUMENT

I. ENFORCEMENT OF THE CALIFORNIA MILK STABILIZATION ACT IS CONSISTENT WITH THE PERFORMANCE OF THE FEDERAL PROCUREMENT FUNCTION.

The three-judge district court held the California milk stabilization act unconstitutional under *Calif. Comm'n.* v. *United States*, 355 U.S. 534, on the legal theory that a military installation is a "place" within the meaning of that provision of the state act (Calif. Agr. Code, sec. 4361) which renders it unlawful for any "place for consumption on or off the premises" to purchase milk at less than the established state wholesale prices, and that the state act accordingly "place a prohibition on the Federal Government." The trial court distinguished *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, on the ground that the Pennsylvania milk stabilization act was held not to apply to the federal government. But the highest California court has construed the California stabilization act as being inapplicable to the United States or its officers and has held that the act regulates only "the distributors who are independent contractors with the federal government." *Pacific Coast Dairy* v. *Dept.*, 19 Cal. 2d. 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285 (1943). This construction that the California act does not apply to officers' clubs, post exchanges, post restaurants, commissary grocery stores and to federal officials purchasing for troop ration is in accord with judicial holdings that the similar milk stabilization acts of Pennsylvania and Massachusetts

do not regulate the United States. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 441, 445, affirmed 318 U.S. 261 (1943); *Milk Control Board* v. *Gorsolini, Dairies, Inc.*, 301 Mass. 174, 16 N.E. 2d 641, 643 (1938).

Calif. Comm'n. v. *United States*, 355 U.S. 534 (1958) is distinguishable since the state common carrier rate regulation there held unconstitutional was found to threaten the discharge of a federal defense function. The contractors in *California Commission* were transporting government-owned military hardware, much of it of a classified and secret nature; and the proposed state regulation, according to the court's decision, would have delayed military shipments, made procurement operations an administrative morass, and would have revealed secret military information. Id. 355 U.S. 534, 545-546. In sharp contrast, the California milk stabilization act affects but one nonmilitary food item in the commissary grocery store or post exchanges, and but one such item in the troop ration. In no event does the state act place a federal official in the dilemma of paying the fixed California minimum price for milk or seeking penalties for obtaining lower prices. First, the act is not applicable to federal officials (*Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285), and second, federal officials can "procure a supply [of milk] from without the state" free of state regulation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, 270 (1943). The state act, therefore,

comes within the precedents which sustain state taxation, safety and health regulation of contractors with the United States, where the effect on the United States is confined to a nondiscriminatory increase in costs. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

II. CALIFORNIA, BY VIRTUE OF ITS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS, MAY ENFORCE ITS MILK PRICE REGULATIONS AGAINST CONTRACTORS DELIVERING MILK TO THESE INSTALLATIONS.

A. Prior to February 5, 1960, delivery of milk to Castle, under purchase contracts executed at another installation (R. 248), was made to the commissary grocery store and to mess kitchens located on Parcel 12, located within state jurisdiction. R. 339, 385, 643, 644. On February 5, 1960, suit was filed in the state courts to require the contractor to comply with the California milk stabilization act. R. 790. On February 15, 1960, the government directed the contractor to make delivery to a vacant lot on Parcel A, an 18.36 acre civilian housing tract located adjacent to the base proper. R. 350-351, 363, 385, 642. On the basis that the original delivery of milk was being made on Parcel A, the district court permanently enjoined continuance of the State's suit. 190 F. Supp. 645, 653-654. The ground for holding the state enactment unconsti-

tutional was that exclusive jurisdiction over Parcel A had been transferred to the United States by California Political Code, Section 34 (Government Code, Section 1114), which provided:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve ~~and~~ execute process and the State's entire power of taxation as provided in this article." Stats. 1943, Ch. 134, p. 898, based on 1872 Political Code, Section 34.

This statute was not cast in the form of a cession of jurisdiction, and, therefore cannot be taken as having by implication surrendered exclusive jurisdiction to the United States. *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946). Early cases such as *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 531 (1885); *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652 (1930); *United States* v. *Unzeuta*, 281 U.S. 138, 142 (1930) are inapplicable because the state statutes there considered contained express language ceding jurisdiction over the lands to the United States. 1875 Laws of Kansas, p. 95; Laws of Nebraska, 1887, p. 628; Arkansas Acts of 1903, p. 346. Instead, the 1872 California Legislature intended to satisfy the congressional requirement in effect from 1841 to 1940 prohibiting the improvement of federal sites until state consent to the purchase of the land were given. Section 3, Joint Resolution of September 11, 1841, 5 Stat. 468, codified

as 1875 Revised Statutes, Section 355, and repealed Act of February 1, 1940, 54 Stat. 19.

Constitution Article I, Section 8, provides in part:

> "The Congress shall have power . . . [17] . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

Clause 17, made applicable by Political Code, Section 34 (Government Code, Section 111) to land purchased or condemned by the government within the state for military purposes, should be read literally and in the manner in which the Commerce Clause and Art. I, Sec. 8, cl. 12 (power to raise armies) are read. *Parker v. Brown*, 317 U.S. 341, 361-363; *Penn. Dairies v. Milk Control Comm'n*, 318 U.S. 261, 269. So read, the provision that "The Congress shall have power . . . to exercise like authority . . ." means that this power is effective to displace local law over military installations only as Congress chooses to avail of it.

If the court should find, contrary to appellants' position that a state's *unqualified* consent to the United States' purchase of land for military purposes results in a transfer of jurisdiction over the land by reason of the preemptive effect of Constitution Article I,

Section 8, clause 17, then it is relevant to note that the legislative consent to the federal purchase of military land expressed in Political Code, Section 34 (Government Code, Section 111), *was qualified* by Statutes of 1897, Chapter 56, page 51 (Government Code, Section 114), which provided:

> "The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Stats. 1943, Ch. 134, p. 899, eff. Aug. 4, 1943.

Admittedly, the United States failed to file land descriptions and plats of Parcel A at Castle with the County Recorder of Merced County (R. 543, 547, 643) and thereby failed to comply with conditions which the 1897 statute expressly makes precedent to the transfer of jurisdiction. *United States* v. *Watkins* (D.C.N.D. Calif. 1927), 22 F. 2d 437, 440; *Pothier* v. *Rodman* (C.A. 1), 291 Fed. 311, 319-321, rev'd. on other grounds, 264 U.S. 399 (1924). Government Code, Section 114 was clearly intended to encompass lands "purchased" at Castle with the state consent granted in Section 111, since it expressly mentions "all lands which . . . .may be *ceded or conveyed* to the United

States, ..." The term "ceded" here refers to lands within state borders which came into United States ownership because of their cession by Mexico (Treaty of Guadalupe Hidalgo, 9 Stat. 22), while "conveyed" imports a purchase of land. Sections 111 and 114 are similar to the West Virginia statute considered in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). In the latter case the court found that a 1931 amendment reserving concurrent jurisdiction to West Virginia qualified the earlier 1881 consent to purchase language. Id. 302 U.S. 134, 145-146.

Further, Parcel A at Castle was purchased in 1943 from a private landowner with funds appropriated under the Lanham Act, 54 Stat. 1125, R. 349, 490, 493. Section 10 of this statute affirmatively provides that the acquisition of real property under the act "shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over the property." Parcel A is now, as it has been since 1942, utilized as a defense housing project and needs the fire, police, health and education services available under state law. R. 349-351. The fact that administrative control of the housing project in September of 1942 was transferred within the government from the National Housing Agency to the Department of War should not deprive these persons of the protection of state jurisdiction.

B. No claim of exclusive jurisdiction is made by the government over the parcels at Travis under California Statutes of 1897, Chapter 59, page 51 ("Govern-

ment Code, Section 114) since there was no compliance with the land description and platting requirements of these statutes. R. 344, 348, 641, Gov. Br. 9. These parcels were acquired from September 1, 1942 to June 17, 1958 (R. 805-817), not between December 1942 and March 1943 as found by the trial court, 190 F. Supp. 645, 652. As at Castle, the purchase contracts for milk were executed at another federal installation, and, therefore, only the delivery of milk, not the sale, occurred at Travis. R. 800, 822, 834, 856. The statutes, federal and state, applicable to Travis are the same as for Castle with the exception that the record does not show if the civilian housing tracts at Travis were acquired under the federal Lanham Act, 54 Stat. 1125. R. 821. Therefore, the similar statutory and factual analysis which establishes that California exercises jurisdiction over Parcel A at Castle supports the finding that California exercises like jurisdiction over the parcels at Travis.

V. The district court held that ownership of the parcels comprising the Oakland Army Terminal were acquired in 1950 and that exclusive jurisdiction over these parcels was transferred in 1950 to the United States under Government Code, Section 126 (Stats. 1st Ex. Sess. 1940, Ch. 151, p. 1981, as amended Stats. 1947, Ch. 1562, p. 3163). But the several parcels at Oakland were acquired in successive purchases from January 15, 1941 to September 11, 1953, and parcels

[1] Memorandum For The United States, *Paul v. United States*, Supreme Court of the United States, October Term, 1961, No. 239, is cited Gov't. Br. 9.

totaling 123.33 acres are leased, not owned. R. 149, 639, appendix pp. 231-232.

Section 126, Government Code, on October 5, 1950, the date as of which the California State Lands Commission found that the State should give its consent to the acquisition of certain parcels at Oakland, provided that:

> ". . . the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law: . . ."

Thus, Government Code, Section 126, like the similar Political Code, Section 34 (Government Code, Section 111) was not cast in the form of a cession of jurisdiction, and, therefore, was not effective to transfer exclusive jurisdiction over these owned parcels at Oakland to the United States. Section 126, at most, was intended by the Legislature to grant to Congress the power under Article I, Section 8, clause 17, to exercise exclusive legislation over Oakland. In addition California retained criminal and civil jurisdiction over Oakland because of the express *qualifications* to the State's consent made in Government Code, Sections 113 and 126, even if clause 17 would otherwise oust the State of jurisdiction.

Section 126 granted consent to the acquisition of land by the United States "upon and subject to each and all of the following conditions and reservations,

in addition to any other conditions or reservations prescribed by law . . ." (emphasis added). This reference to "any other conditions or reservations" in Section 126 clearly incorporates the reservation in Government Code, Section 113, of "the administration of the criminal law of the State with respect to any land over which *any jurisdiction* has been or may be ceded or conveyed to the United States . . ." (emphasis added). Just as the term "conveyed" in the 1897 cession statute (Government Code, Section 114) applied to any lands purchased by the government with the consent granted in 1872 Political Code, Section 34 (Government Code, Section 111), so the term "conveyed" in Section 113 included any lands purchased by the government with the consent given under Section 126. This language in Section 113 reserving state criminal jurisdiction first appeared in Statutes of 1891, Chapter 181, page 262, and was taken directly from the congressional statutes appropriating money for the construction of post office buildings in California (Act of February 28, 1885, 23 Stat. 336; Act of January 12, 1891, 26 Stat. 711; Act of April 28, 1890, 26 Stat. 73) and at the time of its 1891 enactment was understood to reserve state cognizance of offenses against state law committed on such building sites. 20 Ops. Atty. Gen. 611, 613 (1893), see 8 Ops. Atty. Gen. 418, 419 (1857).

In an area of sensitive federal-state relationships, the resolution of the status of the Castle, Travis and Oakland installations in favor of concurrent fed-

eral-state authority will be consonant with the declared federal policy ". . . that the federal government not receive, or retain, any measure whatever of legislative jurisdiction [over federally owned land in the several states], that it hold the installations and areas in a proprietorial interest status only, with legislative jurisdiction remaining in the several states." Jurisdiction Over Federal Areas Within the States, G.P.O., 1956, Pt. I, p. 70.,

III. CALIFORNIA CAN CONSTITUTIONALLY ENFORCE ITS MINIMUM DAIRY FARMER MILK PRICE REGULATIONS AGAINST CONTRACTORS BUYING FROM DAIRYMEN AND RESELLING TO THE UNITED STATES.

The district court found that Agricultural Code, Sections 4280(f) and 4361, pertaining to wholesale and retail minimum milk prices, imposed an unconstitutional prohibition on the Federal Government. 196 F. Supp. 645, 657. The court below also held that the state's wholesale milk price regulations could not constitutionally be enforced against contractors delivering milk to the Castle, Travis and Oakland installations because these were located on land within exclusive federal jurisdiction. 190 F. Supp. 645, 648-654. Yet, neither of these grounds for decision can apply to the state's *minimum milk producer price regulations* which impose price control at the dairy ranch or the processing plant where the producer transfers

either possession or the property interest in the milk to the handler. *United Milk Producers* v. *Cecil*, 47 C.A. 2d 758, 768-769, 118 P. 2d 830 (1941). The transaction controlled by the state's milk producer price law, therefore occurs within state jurisdiction and comes within *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943). The district court therefore erred in holding the state's minimum milk producer price statute unconstitutional.

IV. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN PROCEEDING TO ENTER FINAL INJUNCTIONS WITHOUT THE TAKING OF EVIDENCE, AND WITHOUT AWAITING PENDING CONSTRUCTION OF STATE LAW IN THE STATE COURTS.

In action No. 39030 (Oakland) filed March 30, 1960 (R. 7), the district court by *ex parte* restraining order issued the same day enjoined state officers from continuing the milk stabilization enforcement action filed the previous February 15, 1960, in the State Superior Court. R. 13-15, 154. Thereupon, and notwithstanding state officers' denials of the assertions that the United States exercises exclusive jurisdiction over the Oakland Army Terminal and that the government was threatened with irreparable injury (R. 156-160, 341-495, 657), the district court on motion for preliminary injunction entered its final judgment on the merits holding the state act unconstitutional. R. 666; 190 F. Supp. 645, 659-660. But the issue of the constitutionality of the state enactment was not before the lower court on motion for preliminary injunction.

Mago v. Canning Co., 309 U.S. 310, 316 (1940). Similarly, the district court in No. 39073 (Castle and Travis) by final judgment entered April 19, 1961 (R. 166), restrained state officers from proceeding in the pending state appellate court's appeal of the decision involving Castle Air Force Base. R. 550, 656. Again, as in action No. 39030, the state court jurisdiction first attacked since the state's action had been filed February 5, 1960 (R. 790), before the government's action was filed in the federal court on March 22, 1960 (R. 192). Thus, on motions for summary judgment and despite state officers' denials by answer and affidavit that the United States either exercised exclusive jurisdiction over Castle and Travis, or was threatened with irreparable damage, the court below closed the doors of the state courts to the State. R. 183, 197, 355, 524, 620, 661. In the context of the serious errors of fact made in the trial court's findings, the denials made in state officers' answers, affidavits and attached exhibits presented triable issues of fact which the court below should have resolved only after trial. See *Colorado v. Toll*, 268 U.S. 228, 231-232 (1925).

But, in addition, such trial should have been delayed pending clarifying state court decision. The same issues decided by the trial court were then, and now are, pending before the California Court of Appeals in the *Warne* case, R. 550, 656. Notwithstanding this pendency, the district court held the state act unconstitutional on the basis of the district court's

own construction of the several state statutes involved. The relation of Political Code, Section 34 (Government Code, Sec. 111), to Statutes of 1897, Chapter 56, page 51 (Government Code, Sec. 114), and the relation of Government Code, Section 126, to Government Code, Section 113, has never been considered by the California courts. Their state court interpretation may moot or change the posture of the constitutional issues posed by the government's complaints. The district court, therefore, erred in not abstaining from the exercise of its jurisdiction while these state enactments received clarifying construction in the pending appellate state court actions, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 228-230 (1957).

ARGUMENT

I. ENFORCEMENT OF THE CALIFORNIA MILK STABILIZATION ACT IS CONSISTENT WITH THE PERFORMANCE OF THE FEDERAL PROCUREMENT FUNCTION.

A. The Production and Distribution of Milk Are Intimately Related to the Public Health and Welfare.

"The milking of animals in order to make use of their lactic secretions for human food was one of the greatest human inventions, but the domestication of milk has not been accompanied by a successful domestication of some of the meaner human impulses in all those engaged in the milk industry." *Queensboro Farm Products* v. *Wickard*, (C.A. 2d 1943) 137 F. 2d 969, 974.

These "meaner impulses" in the milk industry led California in 1935 to enact a milk stabilization act having as its purposes the insurance of an adequate supply of wholesome milk to the public, at reasonable prices, through elimination of demoralizing trade practices and the establishment of minimum prices to accomplish stability in the industry. Calif. Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42, and Stats. 1937, Ch. 710, p. 1988. Pursuant to this statute, now Agricultural Code, Division 6, Chapter 17, the Director of Agriculture has established (1) minimum prices at which dairy farmers may sell and distributors may purchase milk, and (2) minimum prices at which distributors may sell milk. R. 283, 395-468. The milk statute and regulations are aimed primarily at the price the producer shall receive for milk, and not at the price which the milk dealer or consumer shall pay. *Knudsen Creamery Co.* v. *Brock*, 37 C. 2d 485, 490, 234 P. 2d 26 (1951).

By census enumeration of 1959, California had 8,046 dairy farms and 10,889 farms classified as having sold milk and cream. 1959 Final Report, U.S. Bureau of the Census, California, Vol. I, Part 48, Table 17, pp. 44-48. Dairy farm investment within the state amounts to approximately one billion dollars, and the dairy industry yields fully 12 percent of the total state income from all farm products. R. 680.

The California milk stabilization act therefore seeks to strengthen a paramount industry in such manner as

to protect the health and prosperity of the state. R. 680-685.

Twenty-three states have enacted milk stabilization statutes similar to California's. Appendix p. 232. A survey by the United States Department of Agriculture estimated that state milk stabilization statutes directly controlled between 16 and 17 billion pounds of milk in 1958, of which 12 billion pounds was consumed in fluid form. Role of Governments in Pricing Fluid Milk in the United States, U.S. Dept. of Agr., A.M.S. 335, 1959, p. 21.

Because the economy of the milk industry is so turbulent and eccentric, government controls have been found at once necessary and difficult. *Hood* v. *DuMond*, 336 U.S. 525, 529 (1949). These difficulties revolve in considerable measure about the complex relations between the dairy farmers and the distributors who buy the milk from the farmers for marketing in fluid or processed form, directly or indirectly through others, to the ultimate consumers. The supply of milk is subject to seasonal fluctuations which, under normal conditions, are substantial *Brannan* v. *Stark*, 342 U.S. 451, 460 (1952). The production of milk in the spring and summer months is from 50 percent to 100 percent greater than the production of milk in the autumn and winter months. On the consumption side, milk is consumed in, roughly, the same quantities in all months subject to daily fluctuations which require the industry to carry an operating reserve of approximately 15 percent. In Los Angeles, for ex-

ample, the volume of fresh milk distributed during warm weather may increase as much as 10 to 15 percent, while comparable decreases occur during cold snaps.[7] This surplus milk, over and above the quantities used for fresh milk consumption cannot be satisfactorily stored for long periods of time, and if a metropolitan area is to have an adequate supply of milk in the fall and winter months, the production of milk for that market in the spring and summer months must be in excess of the demand, during that time, on the fluid milk market. This seasonal surplus "must necessarily occur during those periods in the spring and summer if there are to be enough cows to furnish the requisite supply at periods when the milk yield is less. *Grand View Dairy* v. *Jones*, (C.A. 2d, 1946) 157 F. 2d 5, 7, cert. den. 329 U.S. 787 (1946).

Milk is easily contaminated, and serves as a culture medium in which pathogenic organisms may survive and multiply. Milk is highly perishable, and is "a fertile field for the growth of bacteria." *United States* v. *Rock Royal Co-Op.*, 307 U.S. 533, 549 (1939). To guard against diseases that are transmissible through fluid milk, strict bacteria count standards are required if the milk is to be marketed as fluid milk. Calif. Agr. Code, Sec. 460 et seq. In addition, state law provides for the inspection of dairy cattle so as to exclude milk from cows that suffer from mastitis, tuberculosis, Bangs' disease, or other diseases. Calif. Agr. Code, Sec. 535 et seq. The result is that milk

[7] Tipley, Public Regulation of Milk Marketing in California, University of California Press, 1938, p. 5.

which is produced for fresh use has higher costs of production than milk which is produced for manufacturing uses. Yet, milk which is produced for fresh use, but which is surplus to that use, is disposed of to manufacturers at the manufacturing price and this surplus milk comes into price competition with milk which is produced at lower cost for manufacturing purposes.

Prior to World War I, dairy farmers attempted to bargain with distributors for a flat price which would be applicable to all of the milk delivered to the distributor. Flat prices for milk, however, had peculiarly unstabilizing effects upon the marketing of milk. Under the flat price system, each distributor paid the same price, regardless of the use he made of his milk. Since it was not possible for a distributor to calculate his daily requirements for fluid sales with preciseness, and it was even more difficult for the dairy farmer to regulate the production of his dairy herd to match his distributors' sales, there normally was an excess of milk in the fluid milk plants over the daily fluid requirements. Distributors who had excess supplies usually reacted in one of two ways. They took fresh milk sales from other distributors by offering the excess at reduced prices which, in turn, were passed back to the dairy farmers since the fixed transportation, processing and sales expenses were paid first out of any returns; or, the distributor refused to accept the full quantity of milk offered by the dairy

farmers, who then were left in possession of perishable "homeless" milk.

To meet this problem, the California milk stabilization act provides for the establishing of milk producer prices on a class-use basis so as to encourage distributors to accept milk regularly from farmers who have made the investment required to produce adequate quantities of high quality milk, even in periods in which the distributor has no fluid outlet for some of the milk purchased. Calif. Agr. Code, Sec. 4225 et seq. This system of classified prices requires the payment to milk producers of a higher price for milk sold in fluid outlets than for milk processed into manufactured products like butter and cheese.

However, with milk producer price stabilization, the costs of such factors as raw product, power and public utility services and labor, accounting for nearly 80 percent of the ultimate price paid by consumers were fixed either by state law or by collective bargaining contracts with labor unions.[1] Such high fixed costs encouraged the development of uneconomic competitive practices as distributors sought to increase plan efficiency by increasing sales volume. Such practices included the supplying of free refrigeration cabinets to grocery stores, and the frequent delivery to such stores of small quantities of milk. These inefficiencies tended to be present even after insolvency, since the creditors acquired the business at a fraction of the

[1] Tinley, op. cit. footnote 7, supra, p. 46, at page 78.

original costs and continued operations in the same manner.

These factors, among others, led the Legislature to enact legislation authorizing the Director of Agriculture to establish minimum wholesale milk prices which in the aggregate were to cover only the reasonable necessary costs of hauling, processing, selling and delivering as incurred by efficient distributors. Calif. Agr. Code, Sec. 4355-4360. These provisions eliminated the possibility of collusive wholesale price fixing by distributors since prices were fixed by a state official subject to public scrutiny. Efficient distribution of milk was assured by the enactment of detailed unfair practice provisions. Calif. Agr. Code, Sec. 4280.

Obviously, the heart of the state stabilization act is the requirement that all milk sold in fluid outlets receive the full price. This is so because the minimum price for milk sold in fluid outlets represents the major proportion of the blended price received by dairy farmers. As previously noted, there is in the dairy industry a combination of circumstances which place the dairy farmer at a disadvantage in bargaining for the sale of his milk. These disadvantages are so severe that serious economic consequences result to a large number of members of the community unless government regulation is imposed. *Nebbia* v. *New York*, 291 U.S. 502, 515-518 (1934). The government is the single largest purchaser of milk in California, having purchased 29,057,000 gallons in 1959. R. 348. These federal purchases have a particularly strong

unstabilizing influence on the market because of the large quantities purchased under one contract, e.g. $459,906. R. 251; $500,365. R. 834. By virtue of this strong bargaining power, the government drove the prices paid to producers below the costs of production as soon as the federal court rendered the state milk stabilization act unenforceable as applied to contractors reselling milk to the government. R. 682-683. This action directly undermined the legislative objectives of the milk stabilization act in two ways. First, California dairy farmers sustained losses at an annual rate calculated at not less than $6,900,000 annually. R. 684. Secondly, the California consumer was required to pay a premium for milk, the premium being measured by the difference between the returns from federal sales and the cost of producing and distributing the milk. R. 683.

These facts show that the California milk stabilization act is intended to protect the State's supply of milk by stabilizing its marketing. This stabilization insures that the milk producer will receive his costs of production and that distribution of the milk will be made efficiently, in the interest of the consumer. State officers are, therefore, under a duty to enforce both the milk producer and the wholesale price provisions of the state law, and seek to sustain the constitutionality of both. The injunction of the district court prevents appellants from carrying out this duty, to the detriment of the California consuming public, and the producers and distributors comprising the dairy industry in this State.

B. The California Milk Stabilization Act Does Not Impose a Prohibition on the National Government or Its Officers.

1. THE DISTRICT COURT REFUSED TO FOLLOW CONTROLLING STATE JUDICIAL PRECEDENT

The District Court struck down the state act saying:

"We conclude, therefore, that even if the *Penn Dairies* case [318 U.S. 261] has not been in effect overruled by the *Public Utilities* case [335 U.S. 534], it is inapplicable here because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the *Public Utilities* case, and therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause—Art. VI, Sec. 2." 100 F. Supp. 645, 657.

The section below upon Agricultural Code, Section 4361, does not include by name either the United States or federal procurement officers. Notwithstanding, the district court held that the language was sufficient to include by implication the Government, and government procurement officers, because the State made the wholesale price regulations applicable to milk purchased by "all retail stores, restaurants, confectionaries, or other places for consumption on or off the premises." Agr. Code, Sec. 4361.

4361. . . . no retail store, restaurant, confectionery or other place for consumption on or off the premises shall purchase from any distributor . . . any fluid milk or cream or either of them at less than the prices as established by the director.

The trial court also relied on Agricultural Code Sections 4280.5 and 4113. Section 4280.5 makes it unlawful for a

The district court, by adopting the construction that the California Legislature intended to include the United States within the phrase "other places for consumption on or off the premises" (190 F. Supp. 645, 657), refused to follow the contrary authoritative state court decision (*Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285 (1943)), disregarded the opposite interpretation of the statute by the state official charged with the administration of the statute (R. 620; see *Driscoll* v. *Edison Co.*, 307 U.S. 104, 115 (1939)); and adopted a construction of the statute rendering it unconstitutional where the statute was "reasonably susceptible of another which renders it valid." *Sibbach* v. *American National Bank*, 178 U.S. 289, 300 (1900).

The cited sections were in effect March 12, 1942, the date of the decision by the Supreme Court of California in *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, reversed on another ground, 318 U.S. 285 (1943). Thus, these same provisions were before the highest state court at the time of its decision holding that the

distributor to purchase, process, bottle, transport, deliver or handle fluid milk which is to be sold at less than the state minimum wholesale or retail milk prices. Distributor minimum retail price regulations are inapplicable in this case since no retail home delivery routes are involved. A "distributor" is any person who purchases or handles fluid milk for sale excluding retail stores and establishments (restaurants) where milk is consumed on the premises. Section 4210. Section 4110 makes violation of the milk statute a crime punishable as a misdemeanor. See footnotes 1 and 11, *infra*, pp. 55-56.

[11] Agr. Code, Secs. 4361, 4280 (f), and 4110, formerly appeared respectively in Agr. Code, Secs. 736.13, 736.3 (a) (6), and 737.7 (a), as amended by Stats. 1941, Ch. 1214, pp. 3011, 3017 and 3020.

milk stabilization act "regulates not the Army but the distributors who are independent contractors with the federal government." Id., 194, 24 S.E.2d 818, 830. The district court therefore erred in refusing to follow this construction of the state milk stabilization act since it was bound by the decision of the Supreme Court of California "as though the meaning as fixed by the court had been expressed in the statute itself in express words." *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933); *Salbagstad v. Salbagstad*, 276 U.S. 260, 270 (1928).

The construction by the Supreme Court of California that the statute does not apply to either the United States or to its procurement officers is plainly correct, and is in accord with the decision of the Supreme Judicial Court of Massachusetts holding that the similar Massachusetts milk stabilization act was not applicable to either the government or its officers. *Milk Control Board v. Gorsline Dairies, Inc.*, 301 Mass. 171, 16 N.E.2d 641, 643 (1938); *see Patterson Milk and Cream Co., Inc. v. Milk Control Board*, 118 N.J.L. 385, 192 A. 838 (1937). New Jersey milk stabilization act. The United States Comptroller General also has expressed the opinion that the meaning of

To 1939 statute, Agr. Code, Sec. 736.21, was amended by Stats. 1939, Ch. 734, p. 2776, to add the words "or to the purchaser of any retail store, restaurant, confectionery, or other place for consumption on or off the premises" after the words "milk to" in the first sentence. Emphasis added. This amendment clarified the statute so as to expressly cover the retail grocery store which purchased milk for resale for consumption off the premises. The amendment thus shows no legislative intent to change the construction to be given to *Pacific Coast Dairy v. Dept. of Agr.*, 318 U.S. 285, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333,

the California milk stabilization act is upon the contractor, and not upon the government. 23 Comp. Gen. 454 (Sept. 1, 1943).

In *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, this court had before it the Pennsylvania Milk Control Law, Sections 101-1302, 1937 Pa. Laws, No. 105, p. 417, as amended 1941 Pa. Laws, No. 177, p. 443 (July 24, 1941), which authorized the fixing of minimum wholesale milk prices to be "received by milk dealers." Sec. 803, as amended. Section 103, as amended, defined "milk dealer" to include "any person, including any store, . . . who purchases . . . milk . . . for sale. . . ." "Store" was defined to include "grocery store, hotel, restaurant, . . . or any similar mercantile establishment which sells or distributes milk." Section 103, as amended. Violation of the statute, or its regulations was made a crime punishable as a misdemeanor. Sections 1001-1002. The Supreme Court of Pennsylvania in *Penn. Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 431, 435 (May 25, 1942), adopting the opinion in 148 Pa. Sup. 261, 270, 24 A. 2d 717 (March 3, 1942), affirmed, 318 U.S. 261 (1943) stated: "No attempt is made in the law or in the order of the board to give any order or direction to the [Indiantown Gap] Reservation or its officers." This construction of the state enactment by the State Supreme Court was accepted by this Court in the statement:

> "Here the state regulation imposes no prohibition on the national government or its officers. They

> may purchase milk from whom and at what price they will, without incurring any penalty." *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, 270.

The language in California Agricultural Code, Section 4361, is substantially the same as Section 803, as amended, of the Pennsylvania statute considered in the *Penn Dairies* case. It follows that the similar construction of the California statute by the Supreme Court of California is the correct one, and that the contrary interpretation by the district court in this case is in error.

2. THE DISTRICT COURT CONDEMNED THE STATE MILK PRODUCER PRICE REGULATIONS ON THE BASIS OF A HYPOTHETICAL CONTROVERSY.

The trial court held that California may not constitutionally fix either the minimum milk prices at the producer-distributor level or the price to be received by the distributor for milk ultimately delivered to federal military installations. R. 666, 668. The basis for striking down Section 4280(g) [14] (producer pric-

[14] 4280(g) "The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. . . ."

ing), and Section 4280(f)[13] (wholesale pricing), was the finding that a separate and more general wholesale pricing section (Agr. Code, Sec. 4331)[14] was invalid as a restriction on the United States. 190 F. Supp. 645, 657. The California milk stabilization act includes an adequate severability clause. Agr. Code, Sec. 4420(b).[15] The California Legislature here specifically denies that the several sections in the statute were intended to constitute a unitary system, no part of which can fail without destroying the rest. If therefore arguendo, Section 4361 is unconstitutional as applied, that invalidity should not extend to the remaining regulatory provisions of the statute, nor to the appli-

[13] 4280(f). "The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream or fluid skim milk which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

[14] 4361. "No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article."

[15] 4420(b). "If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted such article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

cation of the remaining provisions of Section 4361, as amended, to distributors.

No attempt has been made by state officers to enforce Section 4361 against either the government or its officers. R. 620-621.[*] The district court therefore entered into a hypothetical inquiry regarding the reach of Section 4361 for the purpose of condemning the entire state statutory scheme. 190 F. Supp. 645, 657. In a similar context this court stated:

> "By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation." *Electric Bond Co. v. Comm'n.*, 303 U.S. 419, 443 (1938). See *Harris Cement Co. v. Detroit*, 362 U.S. 440, 442, n. 3 (1960).

3. THE PROVISIONS OF THE CALIFORNIA MILK STABILIZATION ACT ARE DISTINGUISHABLE FROM THE STATUTE CONSIDERED IN THE PUBLIC UTILITIES CASE.

The trial court failed to note essential differences between the California milk statute and the California

[*] In *People v. Cena*, United States District Court, N.D. Calif., S.D., #39080, California filed suit for declaratory judgment that "neither the United States, nor its officers and employees at Travis Air Force Base . . . are controlled by or subject to the terms of the California milk stabilization statute." 190 F. Supp. 645. The government removed the case to the District Court and there is now pending a motion by state officers to have the action be remanded to the state courts. See *Tucker Warehouse, Inc. v. United States*, 352 U.S. 220, 228-230 (1957).

public utility statute in deciding that the instant case was controlled by the decision in *California Comm'n. v. United States*, 355 U.S. 534 (1958), 190 F. Supp. 645, 657. In the state court proceedings, California sought to enforce the state milk producers' minimum price regulations (R. 744, 756, 769); Agr. Code, Section 4280(g), and to enforce the state minimum wholesale price regulations (R. 150, 550, 655-656, 790; Agr. Code, Section 4280(f).[17] Both sections are specifically limited in their application to the contractor with the United States, and were sought to be enforced only against distributor corporations who had made ultimate delivery of the milk to various military installations. R. 150, 744, 756, 769, 790. It is noted that no contention is made in this case that the government processed or packaged the raw milk, or that it otherwise acted as a "distributor" of milk.

The restrictive language in Sections 4280(f) and 4280(g) sharply contrasts with the wording in the California Public Utilities Code sections considered by the Court in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). Section 530 (Calif. Stats. 1955, Ch. 1966, p. 3608) provided that the California Public Utilities Commission "may permit common carriers to transport property at reduced rates for the United States . . . . to such extent and subject to such conditions as it may consider just and reasonable."

[17] While the wholesale minimum price violation complaints filed in the state courts charged that the defendants as "distributors" had, in failing to receive the state minimum wholesale prices, violated "Chapter 17, Division 6," the specific applicable provision is section 4280(f R. 150, 550.

Public Utilities Code, Section 486, required that common carriers file their rates with the commission and Section 494 required that common carriers charge the rates filed with the commission. Section 2112 applied criminal penalties to "Any person . . . who procures, aids, or abets any public utility in such violation" of the Public Utilities Code. The Court found that Sections 530 and 2112 were applicable to the United States and its contracting officers as "shippers" who did business with common carriers, and therefore that the statute on its face did "deny the United States the right to ship at reduced rates, unless the commission first gives its approval." *Calif. Comm'n. v. United States*, 355 U.S. 534, 538 (1958).

The Public Utilities Code sections considered in the *California Commission* case are therefore distinguishable from Agricultural Code Section 4280(g) which requires the contractor to pay and the producer to receive the established milk producer price and from Section 4280(f) which requires the contractor to receive the applicable wholesale minimum milk price when it delivers milk to the government. It follows that the district court erred in relying on an irrelevant statute which it misconstrued in order to bring the state milk stabilization act within the rule of *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958).

The trial court suggested in its opinion that *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943) had been overruled by the decision in *Calif.*

Comm'n. v. United States, 355 U.S. 534 (1958), 190 F. Supp. 645, 657. That the *Penn Dairies* case was not overruled by *California Commission* is made clear by the court's statement:

> "*Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, *can likewise be put to one side*. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposed no prohibition on the national government or its officers.' Id. 318 U.S. at 270. Here, however, the State places a prohibition on the Federal Government." (Emphasis added.) Id. 355 U.S. 534, 544.

As noted before, the provisions of the California milk stabilization act are substantially the same as in the Pennsylvania milk statute considered by the court in *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261 (1943) and are dissimilar to the Public Utilities statute considered in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). It necessarily follows that the instant case is controlled by the reasoning of the *Penn Dairies* case in which the state milk statute was held to "impose no prohibition on the national government or its officers." Id. 318 U.S. 261, 270.

The trial court also failed to note significant factual differences between *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958) and the facts in the instant case. The public utility regulation considered in *California*

Commission threatened to hamper the discharge of the federal defense function. The contractors in *California Commission* were hauling government-owned military hardware, much of it of a classified and secret nature. Many of the shipments commingled goods moving in interstate commerce, and not subject to California rate regulation, with goods in intrastate commerce, and, therefore, subject to asserted state rate regulation. The Court in that case was therefore justified in finding that the proposed utility rate regulation would unduly delay military shipments, render procurement operations an administrative morass, and would endanger national security by forcing disclosure of the contents of secret military shipments. 355 U.S. 534, 545-546; compare findings of the trial court in *California Commission* in 141 F. Supp. 168, 174-181.

Calif. Comm'n v. *United States*, therefore comes within the line of decisions which have invalidated state regulations which interfere with the effective discharge of federal functions. *Mayo* v. *United States*, 319 U.S. 441 (1943); *Johnson* v. *Maryland*, 254 U.S. 51 (1920). The contractors in the instant case are only regulated with respect to the price they may sell milk owned by themselves, not the government. Federal commissary grocery store, post exchange and officers' club officials are not faced with the alternative present in *California Commission* of either paying the state established hauling rates or risking state imposed penalties for obtaining lower rates. First, these activi-

ties can procure a supply of milk at unregulated prices from without California.' *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Secondly, as distinguished from the state statute considered in *California Commission*, the California milk stabilization act does not apply to United States officials in their purchase of milk. *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 123 P. 2d 442 reversed on another ground, 318 U.S. 285 (1943). Lastly, the difficulties present in *California Commission* where nonregulated interstate military shipments were commingled with intrastate military hauling are absent here since such commingling of milk does not occur in the course of its marketing. The California milk stabilization act, therefore, does no more than to establish the minimum price of but one item purchased by the government, and comes within the precedents which sustain nondiscriminatory state taxation and safety regulation of contractors with the United States, even though such increased costs are passed onto the government. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958); *Alabama* v. *King & Boozer*, 434 U.S. 1 (1941); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940); *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734 (1939), appeal dismissed *sub nom. United States* v. *Baltimore & Annapolis R. Co.*, 308 U.S. 525 (1939).

C. The California Minimum Milk Price Regulations Do Not Conflict with Federal Procurement Policy.

1. CONTRACTORS DELIVERING MILK TO OFFICERS' CLUBS, NONCOMMISSIONED OFFICERS' CLUBS, POST EXCHANGES AND POST RESTAURANTS ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

Officers' clubs, noncommissioned officers' clubs, post restaurants and post exchanges located at Castle, Travis and Oakland purchase milk for resale at such activities. R. 643, 644-645, 647. The buildings, equipment and furnishings for officers' clubs, other service clubs and post exchanges are generally acquired from appropriated funds, but direct operations including the purchase of milk for resale are made with nonappropriated revolving funds. R. 515-516, 537-540. The statutory basis governing the operation of these activities is the authority of the several Secretaries of Defense to establish a system of regulation for the administration of the affairs of the armed forces. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942), post exchanges; *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 388, 393 (1944). Since these activities are conducted with nonappropriated funds, none of their financial obligations are borne by the government. R. 515-516, 537-540.[18] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942). The burden of state regu-

[18] e.g., "No part of any Air Force or Army Appropriation made by this Act shall be used in any way to pay any expense in connection with the conduct, operation, or management of any post exchange, branch exchange, or subexchange within any State, Territory, or the District of Columbia. . . ." Sec. 623, National Military Establishment Appropriation Act, 1950, 63 Stat. 987, 1022.

lation of the contractor would therefore not be passed onto the government, but would be reflected in increased prices which these activities would charge their patrons. Federal procurement policy is similarly unaffected since the armed services procurement act applies only to the purchase, and contracts to purchase, "for which payment is to be made from appropriated funds" and does *not* apply to procurement from nonappropriated funds. 10 U.S.C. 2303(a). It necessarily follows that the district court erred in striking down the California milk stabilization act as applied to milk delivered to nonappropriated activities as being in conflict with the federal procurement statutes. R. 666, 668.

CONTRACTORS DELIVERING MILK TO COMMISSARY GROCERY STORES ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

"Evidence is wanting that Congress in authorizing competitive bidding, has been so concerned with receiving the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price." *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261, 274 (1943).

"It should be borne in mind that in the *Penn Dairies* case the court was dealing with just one commodity, milk, which is nothing more than one item in the ration for the troops. Although, of course, this item of the ration is tremendously important from the standpoint of health, economically it involves only an infinitesimal fraction of the cost of maintaining and supplying the troops

Brief for the United States, Transcript of Record, *Public Utilities Comm'n. v. United States*, Supreme Court of the United States, October Term, 1957, No. 23, p. 184.

"The fact that the U.S. Government, through the Castle Air Force Base commissary, enables our airman [sic] to buy food at a minimum cost for use by them and their dependents often means the difference between them living within their income and not being able to do so. . . . I am informed that increased price in milk does not accrue to the State of California, but to processors and producers of milk. . . . Therefore, it is my opinion that the real losers in any [milk] price increase will be my airmen. . . ." Affidavit of Colonel Dysinger, R. 242-243.

These three quotations lay bare the crux of the government's endeavor to destroy the California milk stabilization act. The armed services are really not concerned that a price increase would occur on that portion of its milk which is obtained for troop ration and which is paid from federal tax revenues (R. 634, 643, 645, 646). The reason being that milk constitutes but one item in the troop ration, constitutes only a small portion of the milk purchased at military installations (22 percent at Oakland; R. 646; 27 percent at Castle; R. 643; 36.5 percent at Travis, R. 645). In addition, the Commodity Credit Corporation pays a subsidy of 8.12c per quart for milk consumed over the eight-cent troop ration in order to encourage the consumption of milk. United States Department of Agriculture bulletin 217-61, July 12, 1961; Ag-

ricultural Act of 1949, 63 Stat. 1051, as amended by the Agricultural Act of 1954, 68 Stat. 897, 900.[19] The remaining percentages of milk delivered to these installations are resold through the commissary grocery stores (Oakland 78 percent, Castle 73 percent, Travis 64.5 percent, R. 643, 645, 646).

The item that motivates the government is the belief that existing congressional pay scales are insufficient to allow personnel "sufficient monies to support their families at even minimum acceptable standards." R. 242.

Congress has specifically rejected the argument advanced here that Congress has failed to make adequate provision for the armed services, and therefore, that the California dairy farmer should shoulder part of the burden through the absorption of losses in their production of milk purchased for sale through commissaries. In hearings before the House Committee on Armed Services, the armed services represented that post exchanges and commissaries are needed: ". . . 3. To provide merchandise at cheaper than ordinary prices in order to implement the service pay of underpaid military personnel." The committee refused to accept this argument stating:

"Considering the third point, we wish to point out that the House Committee on Armed Services has

[19] Prior to April 1, 1961, the subsidy paid by the Commodity Credit Corporation under this program was $4.10 cwt. of 3.8% milkfat milk (8.12¢ per qt. 3.5% milk). Appendix p. 219. Appellants are informed by the United States Department of Agriculture that after April 1, 1961, the subsidy was increased to $4.35 cwt. of 3.8% milkfat milk (8.62¢ per qt. 3.5% milk).

led the way in attempts to increase the pay of service personnel through appropriate legislation. After lengthy and difficult hearings this committee has approved and the House has passed appropriate legislation. We are confident that the Senate . . . will take favorable action on the pending bill. If such favorable action is taken by the Senate [Career Compensation Act of 1949, 63 Stat. 802], *the allegation that service personnel are underpaid must fail.* We subscribe to the remaining reason, convenience and morals, as being the sole justification for the maintenance and operation of post exchanges, ship's service stores, and commissaries." (emphasis added). Print No. 115, Hearings before the House Armed Services Committee, 1949-1950, p. 4001.[20]

No claim is made that the State minimum producer prices are fixed at unfair levels. No claim is made that the wholesale price fixed for the contractor, minus a special 12½ percent volume discount (R. 419, 442, 467, 472) which is not available to private supermarkets, provides an unduly profitable margin above the distributor's raw product and handling costs. What is shown is that the government can always find a contractor who is forced through economic necessity to obtain federal milk contracts at the expense of his suppliers. R. 30, 246. Milk producers are forced to absorb much of the contractor's losses incurred under such contracts because of unequal bargaining

[20] The pay scales increased in the 1949 act were again raised by the Act of May 20, 1958, 72 Stat. 122.

position. R. 681. This inferior position derives from the fact that a large number of dairy farmers sell a highly perishable product to a relatively few contractor-distributors. R. 681.

10 U.S.C. 2304(a)(8) authorizes the heads of agencies to negotiate contracts in lieu of contracting by formal advertising, where "the purchase or contract is for property for authorized resale." Although detailed regulations governing the operation of commissary grocery stores have been promulgated under the procurement act (R. 622-637), neither these regulations, nor the statute itself, purport to exempt contractors with these commissaries from state milk stabilization regulation.

10 U.S.C. 2304(a)(8) is a codification of Section 2(c)(8), of the Armed Services Procurement Act of 1947, 62 Stat. 21. The House Committee on Armed Services in its report on the 1947 statute explained the reason behind granting this exception from competitive bidding for purchases of property intended for resale, stating:

> "Purchases for ships' stores, post exchanges, commissaries, and other similar operations are generally not made by specifications but by brand names, with a view toward accommodating the different tastes and demands of persons availing themselves of their facilities. Also, inasmuch as Government funds are not being used or are not subject to the hazards of business loss, the goods being all subject to resale, there is little need for

a requirement that purchases be affected by advertising procedures. It is quite necessary, on the other hand, to afford such activities the same leeway and discretion as privately owned and managed mercantile enterprises." House Report No. 109, 80th Congress, 1st Sess., p. 30.

Similarly, the Senate Committee on Armed Services stated:

"Purchases for ships' stores, and commissaries and other similar activities using appropriated funds are generally not made by specifications but by brand names, with a view toward accommodating the brand preferences of persons authorized to use such facilities. Therefore, the power to negotiate is required because of the proprietary nature of the articles." Senate Report No. 571, 80th Congress, 1st Sess., p. 7.

These committee reports show that by the exception commissary grocery stores were to be free to purchase by brand name without utilizing competitive bidding and were otherwise to be free from the advertising procedures because government funds "are not subject to the hazards of business loss, the goods being all subject to resale." House Report No. 109, 80th Congress, 1st Sess., p. 30. This avoidance of reliance on competitive bidding is illustrated by the commissary grocery store regulation which requires that "... a reasonable number of better known, nationally or locally established brands must be available." 43 636. In further implementation of this policy to pur-

chase by brand name, the milk purchase contract at Castle provided:

> "Notwithstanding General Provision 25 [R. 336], entitled "Estimated Requirements" the Government reserves the right to purchase brand name items from other manufacturers when required by customer demand for resale in the Commissary Sales Store." R. 320.

There is certainly no intention expressed here by Congress, by the congressional committees, or by the Secretary of Defense, that the contractor delivering milk to these commissary stores should be immunized from state milk stabilization regulation.

Since 1954, the annual statutes appropriating money to the Department of Defense have contained the restriction:

> "That no appropriation contained in this Act shall, after December 31, 1953, be available in connection with the operation of commissary stores within the continental United States unless the Secretary of Defense has certified that items normally procured from commissary stores are not otherwise available at a reasonable distance and a reasonable price in satisfactory quality and quantity to the military and civilian employees of the Department of Defense."

Department of Defense Appropriation Acts, 1954 to 1962, inclusive, 67 Stat. 353;[21] 68 Stat. 353; 69 Stat. 317; 70 Stat. 469-470; 71 Stat. 325-326; 72 Stat. 711; 73 Stat. 366; 74 Stat. 338; 75 Stat. 365. This restric-

[21] The appropriation statutes after 1954 deleted the words "after December 31, 1953" from the quoted provision.

tion was placed in the law by Congress at the request of the Senate Appropriation Committee for the reason that:

> "The committee fails to find any justification for the continuation of Government-operated sales commissaries at military installations which are surrounded by or which abut metropolitan areas. In such instances it appears that private enterprises are satisfactorily located and equipped to meet the requirements of military personnel now served by sales commissaries.
>
> "The committee also believes that at those military installations which are removed from metropolitan trading centers by longer distances, the operation of Government sales commissaries should also be curtailed. This could be accomplished by the negotiation of satisfactory arrangements with reliable sales organizations securing to the Government adequate rentals for buildings leased to such organizations and guaranteeing to the military personnel at such stations *that the prices charged would in no instance exceed those prevailing at the nearest metropolitan area*, ..." (emphasis added). Senate Report, No. 601, 83d Congress, 1st Sess., p. 8.

The quoted statutory restriction on the operation of commissary stores further negatives the assertion that Congress intended to immunize contractors with these commissary stores from the same state laws which regulate competing private grocery stores located in Oakland, California (Oakland Army Terminal, R. 639), in Merced, California (Castle Air Force Base,

R. 283), and in Fairfield, California (Travis Air Force Base, R. 821).* Further, any increase in costs of the commissary resulting from enforcement of the state stabilization act will not be reflected in an increased cost to the federal fisc. This is true because commissary officers are required to adjust "the sales prices in such commissary stores to the extent necessary to furnish sufficient gross revenue from sales of commissary stores to make such reimbursement." Sec. 613, Department of Defense Appropriation Act, 1962, 75 Stat. 365. Thus, patrons of commissary grocery stores will, along with the patrons of private super markets, share both the benefits of having available adequate quantities of wholesome milk, and the burden of paying a state regulated price.

It is apparent, therefore, that it was not the intention of Congress to exempt contractors delivering milk to commissaries from the obligation under state law to pay their dairy farmer suppliers the state established minimum producer prices, and to charge the established minimum wholesale prices.

* Congressman Carl Vinson, Georgia, Chairman of the House Armed Services Committee, stated in committee hearing:

"The whole theory of the commissary privilege—the whole theory of all of it was originally to give it to the people who were at isolated stations who did not have the benefit of metropolitan sales. That is the whole theory and the only justification of it. It was never intended that the Government should go in the business of providing for its personnel where they have the privilege and the opportunity to go to a private place and buy. It was intended on account of the remoteness of stations to accommodate them. It has grown now into a mammoth thing which has disturbed business and has disturbed the Congress." Print No. 106, Hearings, House Armed Services Committee, 1949-1950, p. 3815.

3. CONTRACTORS DELIVERING MILK FOR TROOP RATION ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

In *Penn Dairies*, 318 U.S. 261, the Court held, notwithstanding the existing federal statutes authorizing the military services to purchase by bid or negotiated contract the articles of food needed for the armed services, that Pennsylvania could validly control the price at which a Pennsylvania contractor sold milk to the government for troop ration. The rationale of this and earlier decisions is that prices which are fixed by the state to protect the common welfare must necessarily be viewed in a more favorable light than prices which are fixed by combinations of private sellers who act without the safeguards of government control and publicity. See *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944); *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Munn* v. *Illinois*, 94 U.S. 113 (1876). The Pennsylvania Milk Control Act considered in *Penn Dairies* is similar to the California act: *United States* v. *Wunderlich*, 190 F.Supp. 645. Similarly, the existing procurement statutes, 10 U.S.C. 2301-2314, are substantially the same as the procurement statutes considered in *Penn Dairies*. See legislative history set forth in the appendix at page 234.[23] Since both the state statutes and the federal statutes are substantially the same in this case as in *Penn Dairies*,

[23] The Armed Services Procurement Act of 1947, 62 Stat. 21, was a codification and revision of the prior procurement statutes. House Report, No. 109, 80th Congress, 1st Sess., p. 6. 10 U.S.C. 2301-2314, in turn, is a recodification, without a substantial change of the 1947 statute, 62 Stat. 21, formerly 41 U.S.C. 151-161.

the reasoning in this latter decision should be controlling precedent.

The draft of the proposed bill which became the Armed Services Procurement Act of 1947, had its genesis in the Procurement Policy Board of the War Production Board. This board was composed of representatives of the various contracting agencies of the government and contained the provision in question. House Report, No. 109, 80th Congress, 1st Sess., pp. 26-27; Hearings on H.R. 1366, before a House Subcommittee of the Committee on Armed Services, 80th Congress, 1st Sess., v. 1, pp. 423-433.

As drafted by the government, 10 U.S.C. 2304(a)(10), formerly Section 2(c)(10) of the Armed Services Procurement Act of 1947, 62 Stat. 21, authorizes negotiated purchasing of goods and services if:

> "10. The purchase or contract is for property or services for which it is impracticable to obtain competition."

At the Senate hearings on the bill, Kenneth C. Royall, Under-Secretary of War, testified:

> "As to the exception which deals with supplies or for which it is impracticable to secure competition, this language originally appeared in the Act of March 2, 1901 (31 Stat. 903; 10 U.S.C. 1201), and has been the subject of a number of highly restrictive administrative interpretations. In my opinion, this exception is intended to apply in at least these three situations:
>
> "1. . . .

"2. Where the price of the supply or service has been legally fixed.

"3. . . . ."

Hearing on H.R. 1366 before the Senate Committee on Armed Services, 80th Congress, 1st Sess., p. 15. In referring to procurement of supplies where the price "has been legally fixed," Under-Secretary of War Royall undoubtedly included the purchase of milk for troop issue where minimum prices had been established by state regulation, or where fixed by regulations promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943) state milk stabilization act; *In re Knudsen Brothers Dairy, Inc.*, 18 A.D. 1333, 1348 (1959); *In re Prairie Farms Creamery*, 17 A.D. 841, 843 (1958) federal milk marketing orders. This legislative history shows that Congress, in authorizing informal negotiation whenever the existence of state price fixing regulation made advertising and bidding unfeasible, intended not the fostering of competitive price wars between milk contractors with accompanying losses to dairy farmers and distributors, but the accommodation of milk procurement to the existing state milk stabilization acts.[24]

[24] Accommodation of federal procurement to state milk stabilization statutes is implemented by the awarding of bids by lot where all bids are at the state minimum wholesale price. R. 354, 846; 32 C.F.R. 2.406-4. See 32 C.F.R. 3.210-2(j) which authorizes procurement by negotiation where rates for stevedoring, terminal warehousing, and switching services are established by law or regulation.

Compare *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 151 (1944), state regulation of warehouses upheld under Emergency Price Control Act of 1942, 56 Stat. 23.

Had Congress (or the draftsman of the 1947 procurement act) intended to change the decision in *Penn Dairies*, it could easily have declared that competitive bidding for contracts should be unaffected by state regulation. Examples are not wanting which show that when Congress desires to change the statutory construction made by the Court, that it does so by specific provision, e.g., *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951), changed by Nationality Act of 1940, 54 Stat. 1158, which restored power to revoke naturalization to state courts; *Power Comm'n.* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), changed by Act of March 27, 1954, 68 Stat. 36, to exempt state regulated distributors of natural gas from Federal Power Commission jurisdiction; *United States* v. *California*, 332 U.S. 19 (1947), changed by the Submerged Lands Act, 67 Stat. 29 (1953), which quit-claimed government's title in the submerged lands; *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), changed by Act of March 3, 1945, 59 Stat. 23, which returned immunity to insurance industry from federal antitrust laws to the extent of state insurance regulation.

Because of its superior bargaining strength, and by reason of the economic instability in the dairy industry, the government has the power to drive the

price of fresh milk below the costs of production. R. 680-685. This bargaining advantage in the fall of 1960 and the spring of 1961 was used to force the dairy farmer prices from $5.19 per hundredweight to $2.75 per hundredweight for milk. R. 684. The construction adopted by the trial court that the procurement statutes override state police measures intended to safeguard the public supply of milk is squarely inconsistent with the expressed policy of Congress:

> "... to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy." (Agricultural Act of 1954, 68 Stat. 899.)

The defense departments use Treasury funds in purchasing fresh milk for troop ration, and an increase in price by the contractor due to state regulation would affect the appropriation to the armed services. Analysis shows, however, that this increase in cost will be minimal. The government in its memorandum in response to appellants' Jurisdictional Statement states that it "has concluded as a matter of

procurement policy not to assert immunity from these [state milk producer] minimum prices but to accede to full compliance with those requirements." Gov't. Br. p. 5. In the case of the Oakland Army Terminal, this means that contractors with the government will be required to pay the state established raw product price of 1.34¢ per quart. R. 399.[25] It is reasonable to assume that the contractor will add the cost of taxes, utilities, labor, containers, hauling, and overhead to his raw product costs in contracting with the government. This inference is supported by the expert opinion that with milk producer price stabilization, the costs to consumers of factors accounting for nearly 80 percent of the total retail price were fixed either by law (e.g., utility rates, taxes) or by collective bargaining contracts with labor unions. Tinley, Public Regulation of Milk Marketing in California, University of California Press, 1938, p. 78. Thus, the impact of the California wholesale milk price regulations on the United States Treasury would be measured by the difference between the contractors' costs (raw product, processing, hauling, overhead) and the state established wholesale price. The experience of contractors during the price war shows that this price differential would amount to 25 percent of the contractors' margin between the minimum milk pro-

[25] The regulation establishes the producer price in terms of the constituents of the milk, i.e., cents per pound milkfat, and skim milk per hundredweight. These prices have been converted to costs per quart. See method of calculation at R. 689.

ducer price, and the minimum wholesale price.[26] In the Oakland area, for example, this would amount to 1.87c per quart. R. 399-403, 420. Insofar as the armed services are concerned, this added increment is covered by the Commodity Credit Corporation subsidy of 8.12c per quart for milk issued over the basic 8 oz. ration. United States Dept. of Agriculture Bulletin 2179-61, July 12, 1961, Appendix p. 219. It can hardly be argued, therefore, that the wholesale price regulations impose a different or greater impairment of a federal function than the Pennsylvania wholesale milk price regulations which increased the price to the government 1.6c per quart (318 U.S. 261, 280) and which were sustained in *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); or the ad valorem tax on the contractors' possessory interests in government-owned material and equipment validated in *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958); or the state sales and use taxes imposed on materials used by a contractor on a cost-plus fixed fee contract upheld in *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941) and in *Curry* v. *United States*, 314 U.S. 14 (1941); or the state licensing of a trucking company while performing its government contract to transport federal employees on a Public Works Administration project, approved in *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734 (1939), appeal dis-

[26] By allocating capital, operating and overhead expenses properly allocable to costs incurred in performing federal contracts to consumer sales, contractors were able to pass onto the California consuming public about 25% of the drop in price on government sales. R. 683.

missed for want of a substantial federal question, 308 U.S. 525; or the local construction safety regulations applied to a builder-contractor constructing a post office building and sustained in *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940).

It seems anomalous that the same United States which through Congress has stated its concern for the welfare of the dairy farmer (Sec. 204(a), Agricultural Act of 1954, 68 Stat. 899) should seek to nullify a state milk stabilization act with the same legislative objectives. *In re Willing*, 12 C. 2d 591, 594 (1939). Congress has granted protection to the employees of contractors by limiting their workday to eight hours (Act of Aug. 1, 1892, 27 Stat. 340), and requires such contractors to pay prevailing minimum wages. Act of March 3, 1931, 46 Stat. 1494; Walsh-Healey Act, 49 Stat. 2036). Federal procurement regulation requires that contractors with the government co-operate "to the fullest extent possible" with state agencies responsible for enforcing safety, health and sanitation, maximum hours, minimum wages, equal pay for women, child and convict labor laws. 32 C.F.R. 12.103. The effect of these working and wage statutes and regulations, serve to increase the cost of goods and services purchased by the government which presumes as a matter of procurement policy that all bids submitted were prepared in contemplation of such laws. 22 Comp. Gen. 265, Sept. 24, 1942. Therefore, the slight increase in procurement costs due to the exercise of milk price control

over the seller is but the normal incident of the operation within the same territory of a dual system of government. *Graves* v. *New York*, 306 U.S. 466, 483, 487 (1939). This increase in cost is justified since the state law insures a supply of quality milk in sufficient quantities which might otherwise be endangered due to economic forces peculiar to this industry. For the reasons stated, it is submitted that Congress did not intend to set aside the California milk stabilization act in order to secure for troop ration a lower price for milk than would otherwise be obtainable.

II. CALIFORNIA, BY VIRTUE OF ITS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS, MAY ENFORCE ITS WHOLESALE MILK PRICE REGULATIONS AGAINST CONTRACTORS DELIVERING MILK TO THESE INSTALLATIONS.

A. The Exercise of State Jurisdiction Over the Large Military Installations Within California Will Prevent State-Federal Conflict.

Sovereignty over the territory now comprising the State of California was ceded to California by the Congressional Enabling Act of September 9, 1850, 9 Stat. 452, which admitted California to the Union, there being no reservation of jurisdiction in said Enabling Act. See *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Weber* v. *State Harbor Commissioners*, 18 Wall. 57, 65-66, (1873). California, therefore, exercises jurisdiction over the 242 military

installations located on over 3,800,000 acres within the state borders, unless the State Legislature has ceded, and the government accepted, a retrocession of exclusive jurisdiction. R. 392. It is conceded, of course, that state jurisdiction can be exercised only in a manner which is consistent with governmental uses of these federal lands. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147 (1937).

The question of the jurisdictional status of the Castle, Travis and Oakland installations arises in this case because of the government's assertion that California may not constitutionally apply its milk stabilization act to contractors making delivery of milk on parcels at these bases over which California has allegedly transferred exclusive jurisdiction to the United States. *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943). The claimed federal "exclusive jurisdiction" over the Castle, Travis and Oakland military reservations, and the related jurisdictional claims over the similarly situated remaining 239 military installations, constitutes a matter of extreme importance to the State of California, and to its citizens.[27] The issue goes far

[27] There are approximately 68,000 civilian residents, including military dependents, on military reservations in the three states of California, Kansas and Virginia. Jurisdiction Over Federal Areas Within the States, Part I, Gov't. Printing Office, 1956, pp. 84-96. No breakdown is given for each state, or for the entire United States. This report states that the residents of the naval installation at El Centro, California, an area of claimed exclusive federal jurisdiction, are denied access to the state probate courts, the services of visiting nurses, and access to state hospitals. Id. pp. 91-92.

beyond the applicability of state milk stabilization statutes as stated in a federal study:

> "The State no longer has the authority to enforce its criminal laws in areas under the exclusive jurisdiction of the United States. Privately owned property in such areas is beyond the taxing authority of the State. It has been generally held that residents of such areas are not residents of the State, and hence not only are not subject to the obligations of residents of the State but also are not entitled to any of the benefits and privileges conferred by the State upon its residents. Thus, residents of Federal enclaves usually cannot vote, serve on juries, or run for office. They do not, as a matter of right, have access to State schools, hospitals, mental institutions, or similar establishments. The acquisition of exclusive jurisdiction by the Federal Government renders unavailable to the residents of the affected areas the benefits of the laws and judicial and administrative processes of the State relating to adoption, the probate of wills and administration of estates, divorce, and many other matters. Police, fire-fighting, notarial, coroner, and similar services performed by or under the authority of a State may not be rendered with legal sanction, in the usual case, in a Federal enclave." (Jurisdiction Over Federal Areas Within the States, Part II, Gov't. Printing Office, 1957, p. 4.)

These harsh results may have been a necessary concomitant to the desire in the federal government in the early days of the Republic to claim exclusive jurisdiction over federally acquired property. However, the

tremendous expansion of federal functions which have occurred in the recent history of the United States, with a resultant increase in federal land holdings, has drastically altered conditions affecting the question of the exercise of state jurisdiction over federally owned land. These changed conditions show that the diverse problems arising from the existence of federally owned lands within a state cannot rationally be determined under mechanically applied rules of jurisdiction, but require resolution upon a consideration of all the relevant facts in order to determine if the matter is one which may be appropriately regulated by the states in the interests of the safety, health, and well-being of their citizens, without impairing the governmental uses of such federal installations. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937). Analysis of the relevant constitutional provisions and of the relevant state and federal statutes, when considered in the light of their contemporary application, require the conclusion that California exercises jurisdiction over the Castle, Travis and Oakland installations. This result would be consonant with the declared federal policy that: "With respect to the large bulk of federally owned or operated real property in the several states and outside of the District of Columbia it is desirable that the federal government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest status only, with legislative jurisdiction remaining in the several states." Juris-

diction Over Federal Areas Within the States, Government Printing Office, 1956, Part I, page 70; see letter dated May 14, 1957, from the United States Deputy Attorney General to United States Senator Clair Engle set forth in House Report No. 624, 85th Cong., 2nd Sess., pp. 30-33.

B. California Exercises Jurisdiction Over the Castle Installation.

1. ACQUISITION HISTORY AT CASTLE.

Castle Air Force Base, totaling 2376 acres in area (R. 380), is located in Merced County, California. R. 383. The parcels comprising the base proper were acquired from private land owners by conveyance and by condemnation from June 20, 1946, to June 11, 1956. R. 352, 383-387. No claim is made by the government that it exercises jurisdiction over the base proper. Gov't. Br. 12-13. This concession is required since the base proper was acquired subsequent to the enactment of Section 126, and because the United States has made no application to the California State Lands Commission as required by Section 126 California Government Code. (Stats. 1st Ex. Sess. 1946, p. 199, eff. May 31, 1946.)[28] R. 644.

The United States does claim jurisdiction over parcel "A," a civilian housing tract of 18.36 acres which is located outside the main entrance gate at Castle and which was acquired July 17, 1943, by the government pursuant to the Lanham Act, 54 Stat. 1125. R. 229.

[28] Sec. 126 Calif. Gov. Code, Stats. 1st Ex. Sess. 1946, p. 199, is set forth in the appendix p. 204.

233, 349, 381, 490, 493. While the government asserts that title to parcel "A" was acquired by it on April 6, 1943, the court below "assumed" that title was acquired on July 17, 1943. R. 543, 547; 190 F. Supp. 645, 654. See infra pp. 116-117.

2. PROCUREMENT HISTORY AT CASTLE.

a. MILK PURCHASED WITH APPROPRIATED FUNDS

Prior to February 5, 1960, delivery of milk purchased for resale from appropriated funds was made to the Base Commissary and to mess kitchens located on Parcel 12 (part of the base proper) at Castle. R. 350-351, 642.

State officers on February 5, 1960, filed suit in the state court to enforce the California milk stabilization act against the contractor delivering milk to Castle. R. 790. Ten days later, on February 15, 1960, for the reason that California concededly exercises jurisdiction over Parcel 12, the government directed the contractor to cease making delivery to Parcel 12 and to commence making delivery to Parcel "A," the 18.36 acre civilian housing tract. R. 350, 363, 385, 642. Delivery to Parcel "A" was accomplished by the contractor leaving a loaded refrigerated trailer on a vacant lot on Parcel 12. R. 350, 363, 385, 642. Air force personnel, using a government tractor, then hauled the trailer onto the base proper where the milk was unloaded at buildings located on Parcel 12. R. 350-351, 642.

To say the least, the government here changed its pattern of acceptance of delivery of milk in an attempt

to clothe its contractor with immunity from the State milk stabilization act. This is not an isolated example, but was repeated at the Travis Air Force Base where deliveries of milk were originally accepted at Dining Halls No. 6 and 7, and at Building 381 on Parcel 49. R. 819. Thereafter, it was evidently ascertained that Parcel 49 was acquired (May 26, 1946; R. 806) just four days prior to the enactment of Section 126, California Government Code (eff. May 31, 1946, Stats. 1st Ex. Sess. 1946, p. 199), that no application for state consent to the purchase of land at Travis had ever been made to the California State Lands Commission pursuant to Section 126 (R. 544, 548, 644), and that Parcel 49, therefore, lay within state jurisdiction. Thereupon, as at Castle, the government discontinued receipt of delivery of milk on Parcel 49 at Travis. R. 544, 548, 819, 821.

The government in this court argues that the sales of milk, including sales at Castle, "were consummated on lands under the exclusive jurisdiction of the federal government." (Gov't. Br., p. 4.) The government fails to state that the contracting officer at Castle lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 248, 272. Since the milk purchase contracts at Castle far exceeded this sum (e.g. $459,906.00; R. 251), the offers of sale were accepted in writing by higher military authority not located at Castle. R. 248. The "sale," in the sense that the property interest in the milk was to be subsequently transferred to the govern-

ment by virtue of the contract, therefore, did not take place on Parcel A, or at the base procurement office located on the base proper. *United States* v. *Parcell Envelope Co.*, 249 U.S. 313, 319-32 (1919); *Garfielde* v. *United States*, 3 Otto 242, 243 (1876).

The situation then, is that milk produced on dairy farms located within state jurisdiction is purchased and processed by the contractor within state jurisdiction. This milk is then resold by the contractor to the government in a sales transaction not occurring at Castle, and is delivered to a civilian housing tract outside the installation *en passant* to Parcel 12 located within state jurisdiction where the milk is to be resold through the commissary store and issued in troop ration. The violations of the state milk stabilization act by the contractor in question violates state public policy, and California as a sovereign state should be constitutionally entitled to forbid this conduct occurring within its borders, even though such action may have repercussions on the 18.36 acre housing tract which is claimed to lie within exclusive federal jurisdiction. See *Osborn* v. *Ogden*, 310 U.S. 53, 62-63 (1940); *Alaska Packers Ass'n.* v. *Comm.*, 294 U.S. 532, 541 (1935); *Skiriotes* v. *Florida*, 313 U.S. 69, 76-79 (1941).

b. Milk Purchased With Nonappropriated Funds

Milk purchased with nonappropriated funds is delivered to Parcel 12 at Castle for resale at the Post Exchange, Officers' Club and the Non-Commissioned Officers' Open Mess. R. 643. Parcel 12 lies within state

jurisdiction since the government has never made application to acquire jurisdiction over Castle to the California State Lands Commission as required by Section 126, California Government Code, R. 644. Since deliveries of milk to the Post Exchange, Officers' Club and the Non-Commissioned Officers' Open Mess occurred on land within conceded state jurisdiction, California can constitutionally enforce its milk stabilization act against contractors delivering milk to the activities. *Pacific Coast Dairy, Inc. v. Dept. of Agriculture*, 318 U.S. 285 (1943).

2. THE CALIFORNIA LEGISLATURE IN GRANTING STATE CONSENT TO THE FEDERAL PURCHASE OF LAND FOR MILITARY PURPOSES INTENDED TO SATISFY A REQUIREMENT OF CONGRESS AND DID NOT INTEND TO TRANSFER EXCLUSIVE JURISDICTION TO THE UNITED STATES.

The trial court assumed "without deciding" that title to Parcel A at Castle had been conveyed to the United States effective July 17, 1943. 190 F. Supp. 645, 654. It further found that exclusive jurisdiction over Parcel A was transferred to the United States under Political Code, Section 34, as amended, as of January 3, 1944, by virtue of the blanket notice of acceptance of jurisdiction given on that date. R. 639; 190 F. Supp. 645, 654.

1872 Political Code, Section 34, as originally provided in relevant part:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts,

The text of the [illegible] dated January 3, 1944, is set forth in the appendix at p. 222.

magazines, arsenals, dockyards, and other needful buildings, . . ."[30]

The remaining provisions of Section 34 reserved the state powers of taxation, and the right to serve process on the land so purchased or condemned. In addition, the statute reserved the state's power of taxation "with respect to any tract or land over which any jurisdiction is ceded or granted by the State to the United States," thus clearly implying that Political Code, Section 34, did not itself cede or grant jurisdiction to the United States. Stats. 1939, Ch. 710, p. 2231.

Technically, Section 34 had been repealed the previous August 4, 1943 (Stats. 1943, Ch. 134, p. 1009) and, therefore, was not in force when Parcel A was acquired on July 17, 1943. Its provisions, though, were continued in force by the enactment of Government Code, Section 111 (Stats. 1943, Ch. 134, p. 898, eff. Aug. 4, 1943) which provided:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

1872 Political Code, Section 34, was enacted to satisfy the congressional requirement in effect from 1841 to 1940 "that no public money shall be expended upon

[30] The text of Political Code, Section 34, as enacted in 1872 and as amended Stats. 1939, Ch. 710, p. 2231, are set out in the appendix at pp. 203, 204.

any site or land hereafter to be purchased by the United States" for military purposes until the Attorney General approves the validity of title and until "the consent of the Legislature of the State in which the land or site may be shall be given to said purchases." Section 3, Joint Resolution of September 11, 1841, 5 Stat. 468, codified as Section 355, 1875 Revised Statutes, repealed Act of February 1, 1940, 54 Stat. 19.[2] This provision was read by the Comptroller General to mean that federal funds could be used to purchase land without state consent, but could not be used to improve such lands unless state consent to the purchase were given. 3 Comp. Decs. Treasury 530 (1897). It is clear that Section 3 was to be read literally to require only a state consent, and not a state cession of jurisdiction, since Section 6 of the resolution dealt with cessions. Under Section 6, the heads of federal agencies were directed to apply to the states for cession of jurisdiction over lands under their administration. If cession were refused, the agency heads were to report the refusal to Congress.[3] Great importance was evidently attached by Congress to the securing of

[1] The Joint Resolution of September 11, 1841, 5 Stat. 468 and R.S. sec. 355, are set forth in the Appendix at pp. 170-172.

[2] Section 6, Joint Resolution of September 11, 1841, 5 Stat. 468, was not carried over into R.S. sec. 355, as was section 3. Congress made express statutory provision when it desired that a state cede jurisdiction over federally-owned property to the government. Act of May 20, 1826, 4 Stat. 178 (arsenal); see acts appropriating monies for post office buildings: Acts of April 29, 1878, 20 Stat. 39; May 28, 1882, 22 Stat. 93-96; January 13, 1885, 23 Stat. 282; March 3, 1887, 24 Stat. 544; August 21, 1888, 25 Stat. 444; January 21, 1891, 26 Stat. 722; January 21, 1891, 26 Stat. 723; January 21, 1891, 26 Stat. 724; January 21, 1891, 26 Stat. 725; January 24, 1891, 26 Stat. 727.

state consent to purchase, since federal expenditures were prohibited unless such consent were given." No such restriction on funds applied if state cession of jurisdiction were refused.

The Congressional Record gives no indication of the reasons prompting the enactment of this joint resolution. A federal 1957 report suggests that the dual requirements that the Attorney General approve title and that the state consent to the government's purchase of land arose from a controversy between the United States and the State of New York over title to a tract of land on Staten Island upon which fortifications had been maintained at federal expense. Congressional Globe, 27th Congress, 1st Session, pp. 121, 123, 140. The report concluded that by this resolution "Congress presumably sought to avoid a repetition of the Staten Island incident, and to avoid all conflict with states over title to land." Jurisdiction Over Federal Areas Within The States, Government Printing Office, 1957, Part II, pp. 32-33.

This restriction on the spending of appropriated money unless a state consented to the purchase of the land was interpreted by the Department of Justice as prohibiting the expenditure of any money unless a state ceded exclusive jurisdiction to the United States over such land. 3 Ops. Att'y Gen. 240 (1838); 3 Ops. Att'y Gen. 261 (1838); 3 Ops. Att'y Gen. 282 (1838); 8 Ops. Att'y Gen. 241 (1856). The legislative history behind the government's building of the projects there involved includes the states' unlimited cession of jurisdiction to the United States under the decisions in *Van Brocklen v. Anderson*, 1 Cranch 253, 267 (1803), and *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541 (1885). This impasse caused by a misreading of congressional intent was corrected by the 1940 repeal of the requirement. Act of February 1, 1940, 54 Stat. 19. See House Report No. 1329, 76th Cong., 1st Ses., p. 2.

It is noted that the resolution followed the language of earlier statutes, and similar requirements have been subsequently enacted by Congress. Act of April 2, 1794, 1 Stat. 352 (arsenals); the Act of May 20, 1826, 4 Stat. 178 (arsenal); see also Sec. 7, 1911 Weeks Forestry Act, 36 Stat. 963 (forest lands); Sec. 7, Act of February 18, 1929, 45 Stat. 1222 (migratory bird refuge); see Sec. 2(d), Act of August 21, 1935, 49 Stat. 668 (historic sites). In each of the cited instances the Congress insured, by requiring state consent, that the federal project was welcomed by the people in the state affected.

Political Code, Section 34 (Government Code Section 111) was not cast in the form of a cession of jurisdiction, but instead, granted state consent to the federal purchase of land for military purposes. It is therefore similar to 1927 Acts of Arkansas, Act 108, page 302, which granted "consent of the State of Arkansas . . . to the acquisition by the United States by purchase" of land within state borders for federal forest purposes. And, like the California enactment, the 1927 Arkansas statute reserved jurisdiction to serve process on such lands. The Court in Howard v. Gipsy, 327 U.S. 174, 186 (1946), in an opinion by Mr. Chief Justice Stone, held that the Arkansas statute

> "... made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded as to

1927 Acts of Arkansas, Act 108, page 302 is set out in the appendix at pp. 225-226.

tendency to surrender to the Federal Government the state legislative jurisdiction over the area in question so far as exercise of that jurisdiction is inconsistent with federal finding.

The decision in the case was that Arkansas retained jurisdiction over the federal forest lands within the state, and that it could constitutionally apply a sales tax to timber severed from such lands by federal contractors.*

The Constitution that [illegible] Article III, Section 2 [illegible] with state jurisdiction [illegible] the state [illegible] state [illegible] [illegible] [illegible]

zcuta, 281 U.S. 138, 142 (1930). However, in each of the cited cases the Court was careful to point out that the state statute was in the form of a cession of jurisdiction. Thus, in the *Fort Leavenworth* case, the Kansas statute stated:

> "That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation . . . ." 114 U.S. 525, 528; 1875 Laws of Kansas, p. 95.

Similarly in *United States* v. *Unzeuta*, 281 U.S. 138, 141, Laws of Nebraska, 1887, page 628, read in part:

> "That the jurisdiction of the State of Nebraska in and over the military reservation known as . . . Fort Robinson be and the same are hereby ceded to the United States."

In *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 656-657, Arkansas Acts of 1903, page 346, provided in part:

> "The State of Arkansas hereby consents to the purchase . . . by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, custom house, light house, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all grounds thus purchased by the United States . . . is hereby ceded to the United States."

The Court, therefore, in the *Fort Leavenworth* and *Unzeuta* opinions had before it statutes cast in the form of express cessions of jurisdiction, and in *Surplus Trading Co.* had before it a statute which both consented to the federal acquisition of land, *and* which expressly ceded jurisdiction to the United States over the land so purchased. The general language in these opinions that state legislative consent to the federal purchase of land cedes exclusive jurisdiction to the government, therefore, must be taken to refer to statutes cast in the form of express cessions of jurisdiction and not to statutes granting consent to purchase only.[37]

And, where a state, in an express cession statute, makes a transfer of exclusive jurisdiction to the United States, the cession occurs because of the state action and not because of the operation of Article I,

[37] The briefs filed by the parties in *Pacific Coast Dairy* v. *Dept.*, 315 U.S. 285 (1943) and in *Howard* v. *Commr's of Louisville*, 344 U.S. 624 (1953) show that the parties assumed, *without argument*, that the land involved lay within exclusive federal jurisdiction. In both cases the plaintiffs' complaint in the trial court alleged that the state had ceded exclusive jurisdiction to the United States, and in both cases the defendants filed demurrers which admitted this allegation provisionally for the purpose of testing the question of law involved. Brief for Appellees, *Pacific Coast Dairy* v. *Dept.*, Supreme Court of the United States, Oct. Term, 1942, No. 275, p. 3; Brief for Appellees, *Howard* v. *Commr's of Louisville*, Supreme Court of the United States, Oct. Term, 1952, No. 295, pp. 3-5. As said by Mr. Justice Sutherland in *Webster* v. *Fall*, 266 U.S. 507, 511 (1925): "The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Section 8, clause 17, of the Constitution. *Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934).

The trial court cited no judicial authority in support of its holding that either Section 34 or Section 111, ceded exclusive jurisdiction over Castle to the United States. 190 F. Supp. 645, 654. In contrast, the district court placed its sole reliance on a report of a previous California Attorney General, Jurisdiction Over Federal Enclaves in California, Calif. Dept. of Justice, 1958, pp. 3, 42, 72-73. 190 F. Supp. 645, 654. This report at pages 3 and 4 cites *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, in support of its holding that California Political Code, Section 34 (predecessor to Gov. Code Sec. 111) effected a cession of exclusive jurisdiction, and on pages 72 and 73[a] cites only the opinion of the former California Attorney General in 23 Ops. Cal. Atty. Gen. 14 (1954). This opinion in 23 Ops. Cal. Atty. Gen. 14, erroneously relied on *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930), for its conclusion that Political Code, Section 34, made a cession of jurisdiction. As noted above, the state statutes before the court in the *Fort Leavenworth* and *Surplus Trading* cases were express cession statutes, and, therefore, these decisions are not relevant in determining the legal effect of Section 34, which contained no words of cession. Further, the then California Attorney General in 23 Ops. Cal. Atty. Gen. 14, 21, carefully qualified his conclusions saying

[a] This issue is not discussed on page 3. Page 11 of this report states that the California consent and cession statutes have "chaotic redundancy."

"We have not been requested to determine the nature and extent of jurisdiction over Fort Ord. We reserve opinion and comment as to the nature and extent of jurisdiction over this area and over other military enclaves in this State until specific factual situations giving rise to jurisdictional problems have been submitted to us for solution." The statement in the opinion construing Political Code, Section 34, is therefore *obiter dictum*.

It follows that the trial court erred in holding that Political Code, Section 34 (as codified into Gov. Code Sec. 113), transferred jurisdiction over Parcel A at Castle to the United States since neither Political Code, Section 34, nor Government Code, Section 111, was cast in the form of a cession of jurisdiction and, therefore, neither statute was intended to, nor did they transfer jurisdiction over Parcel A to the United States.

4. ARTICLE I, SECTION 8, CLAUSE 17, IS NOT PER SE EXCLUSORY OF LOCAL LAW.

The preceding discussion demonstrates that Government Code, Section 111, was not intended to effect a cession of exclusive jurisdiction over Parcel A at Castle. Section 111, by granting the state's ". . . consent to the purchase or condemnation by the United States of any tract of land within this State . . .", brought such tracts within the congressional power to exercise exclusive legislation over them. Yet this power is effective to displace local law only as Congress chooses to exercise it.

Article I, Section 8, provides in part:

> "The Congress shall have power . . . [17] . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

The genesis of Article I, Section 8, clause 17, is to be found in the proposal submitted to the Constitutional Convention on September 5, 1787, by the Committee of Eleven, to whom the earlier proposals of Madison and Pickney had been referred. The original draft proposed that Congress be granted power:

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of the legislature become the seat of Government by the U[illegible] S[illegible] and to exercise like authority over all places purchased for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings." Debates on the Confederation and Constitution, Elliott, Vol. 5, pp. 510-511; The Records of the Federal Convention, Farrand, Vol. 2, p. 509.

In debate on the convention floor, Massachusetts delegate Elbridge Geary raised objection to the provision giving Congress authority to exercise the power

of exclusive legislation over federal forts and arsenals. The substance of the debate was reported by Madison, as follows:

> "Mr. Geary contended that this power might be made use of to enclave any particular state by buying up its territory, and that the strongholds proposed would be a means of owing the state into an undue obedience to the general government.
>
> "Mr. King thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word 'purchased,' the words 'by the consent of the Legislature of the State in which the same shall be.'" Elliot, op. cit., pp. 511-512; Farrand, op. cit., p. 510.

This court undoubtedly had reference to both the constitutional language of Article I, and to these debates, in asserting that: "It would seem to have been the opinion of the framers of the Constitution that, without the consent of the states, the new government would not be able to acquire lands within them: . . ." *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 530 (1885).[*] Therefore, there is no question

[*] In *Kohl* v. *United States*, 1 Otto 367 (1876), the court held that the government possessed the power of eminent domain by virtue of its sovereignty under the Constitution. In the act appropriating money for the purchase of land for a post office at Cincinnati, Ohio, Congress conditioned the spending of the appropriation upon the state's making a cession of jurisdiction. Act of March 12, 1872, 17 Stat. 39. In response, the Ohio Legislature consented to the federal purchase of land for a post office site, and expressly made a cession of jurisdiction over the property so purchased to the United States. Act of April 20, 1872, 69 Ohio Laws 81. The court, therefore, in *Kohl*, did not have before it the question of the interpretation of Article I, Section 8, clause 17, posed in this instant case.

but that the requirement for state consent was added simply to foreclose the possibility that a state might be politically subjugated by the location of powerful federal "strongholds" within state borders and was not intended to secure cessions of exclusive jurisdiction.

Thus, the power in Congress to legislate under clause 17 is to be distinguished from a cession of exclusive jurisdiction which may or may not come within clause 17. For example, the cession of exclusive jurisdiction by Maryland over the District of Columbia (Act of December 23, 1788, Kilty's Laws of Md., Ch. 46; Act of December 19, 1791, 1791 Laws of Maryland, Ch. 55); and the acceptance by Congress (Act of July 16, 1790, 1 Stat. 130; Act of February 27, 1901, 2 Stat. 103) has been treated as coming within clause 17 (*District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 105-109 (1953)), while cessions of exclusive jurisdiction over land purchased for park purposes (*Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 529 (1938)) and of exclusive jurisdiction over land acquired by treaty before the state was admitted to the Union (*Benson* v. *United States*, 146 U.S. 325, 330 (1892)) was held not to come within clause 17. Of course one reason for the difference in treatment is that clause 17 requires a "cession of particular States" as a condition to the establishing of the seat of government while forts and arsenals must be purchased by the consent of the state in which the land is located. A cession of exclusive jurisdiction has been held to deprive persons living in

such areas of the rights of residency in the state. *Stultz v. Reese*, 19 Ohio St. 306, 316 (1869), cited with approval in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 536 (1885); *State v. Willett*, 117 Tenn. 334, 97 S.W. 299 (1906). It has been held to deprive residents of such an area of the right to send their children to the public schools. *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 449, 100 A. 2d 621 (1953); Opinion of the Justices, 42 Mass. 580 (1841), and of the right to sue for divorce in the state courts. *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729 (1926). It cannot be believed that the Constitutional Convention intended that the power to legislate was to be the equivalent of a cession of exclusive jurisdiction with the consequences such as these.

In deed, Congress has recognized that this power of legislation is not *per se* pre-emptive by leaving state jurisdiction intact in those instances where the clause 17 powers have been exercised. For example, section 11(b) of the Act of July 7, 1958, 72 Stat. 347, which granted statehood to Alaska reserved to the United States "the power of exclusive legislation", under clause 17 over military tracts of land owned by the government by virtue either of cession from Russia under the Treaty of March 31, 1867, 15 Stat. 539, or because of purchase or condemnation from private land owners. Express provision was made, though, that this reservation of authority should not operate to prevent the State from exercising concurrently with the government "any jurisdiction whatever which it would

have in the absence of such reservation of authority." In sharp contrast, section 10 of the statute reserved "exclusive jurisdiction" for the United States over "special national defense withdrawals" to be established by the President in which the government was to have "sole legislative, judicial and executive power." See House Report No. 624, 85th Cong., 2nd Sess., pp. 22-23, 30-33.

Similar provisions are set forth in Section 16(b) of the Act of March 18, 1959, 73 Stat. 11-12, which admitted Hawaii into the Union. Under Subsection 16(b) the Congress reserved authority to exercise the "power of exclusive legislation" under Clause 17 with provision for concurrent state jurisdiction, over military parcels owned by virtue of either cession from the Republic of Hawaii under the Joint Resolution of July 7, 1898, 30 Stat. 750, or because of purchase or condemnation from private land owners. "Sole and exclusive jurisdiction" in the United States was continued over such military installations as are determined by the President to be "critical areas." See Senate Report No. 80, 86th Cong., 1st Sess., p. 20. Similarly, the Act of February 23, 1927, 44 Stat. 1176, retroceded "jurisdiction and sovereignty" over a tract of land in the District of Columbia to the State of Virginia, but reserved the power to "exercise exclusive legislation" over the area while in the government's possession.

The Act of March 4, 1909, 35 Stat. 1088, 1143, now 18 U.S.C. 7(3), extended the criminal jurisdiction of

the federal courts to include offenses committed on "any place purchased or otherwise acquired by the United States, by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The enactment of this statute was an idle act if a state's consent to the federal purchase of land effected a cession of exclusive jurisdiction since the federal courts since 1790 had exercised criminal jurisdiction over offenses committed on areas within "exclusive federal jurisdiction." Act of April 30, 1790, 1 Stat. 113, 116.[7]

The legislative power in Congress, under Clause 17, has been treated the same as its powers under Article IV, Section 3, Clause 2, which authorizes needful rules and regulations respecting "the territory or other property belonging to the United States . . ." *District of Columbia v. Thompson Co.*, 346 U.S. 100, 105-106 (1953).

It would be a strange result if, of the supremacy powers given Congress in Article I, Section 8, and Article VI, Section 2, it was held that one, and only one, was *pro se* exclusory of state law in every case where there was an opportunity to exercise it. Clause

[7] It is arguable that the United States Attorney General should have read this grant of federal judicial jurisdiction right out of existence by omitting the phrase "any place purchased or otherwise acquired . . . by consent of the legislature of the State in which the same shall be" in the 1790 statute, the phrase "exclusive jurisdiction of the United States" in the 1790 statute, Act of March 4, 1909, 35 Stat. 1088, 1145, Act of April 30, 1790, 1 Stat. 113, 116, for the United States. *Williams v. United States*, Supreme Court of the United States, Oct. Term, 1949, No. 889, p. 6, fn. 3.

17 should in this regard be read literally and in the manner in which the Commerce Clause in Section 8 is read. *Parker* v. *Brown*, 317 U.S. 341, 361-363 (1943). So read, the provision that "The Congress shall have power . . . to exercise like authority [exclusive legislation] over all places purchased by the consent of the legislature . . ." Means that this power is effective to displace local law over military installations only if Congress chooses to avail of it. If a state's grant to Congress of the power "to exercise exclusive legislation" under clause 17 ousts state jurisdiction over the parcel involved, then any attempted reservation of state jurisdiction in a state statute granting consent to the federal purchase of land for military purposes would be ineffective under the Supremacy Clause of the Constitution. But in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146-149 (1937), it was squarely held that such a reservation of state jurisdiction was effective. It follows that the power in Congress "to exercise exclusive legislation" over federally-owned land does not itself exclude state law or oust state jurisdiction over such land.

Of course, this grant of legislative authority to Congress under Constitution Article I, Section 8, clause 17, is cumulative to the other grants of power to Congress. Thus, Congress has ample authority to acquire land under the Commerce and War Clauses without state consent. Const. Art. I, Sec. 8, cl. 3 and 11-16; *United States* v. *Cormack*, 329 U.S. 230, 237 (1946), post office; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

534 (1941), reservoir; see *Ashwander* v. *Valley Authority*, 297 U.S. 288, 326-330 (1956), construction of a dam. Further, the authority to pre-empt the application of state law to federally-owned land is found in the power to "make all needful rules and regulations respecting the territory . . . belonging to the United States." Const. Art. IV, Sec. 3, cl. 2. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917); *Camfield* v. *United States*, 167 U.S. 518, 525-526 (1897).

For the reasons stated, it is submitted that the power in Congress under clause 17 to legislatively control land purchased with state consent has not deprived California of jurisdiction over Parcel A at Castle where Congress has not chosen to exercise this power.

5 THE SUBSEQUENT (1897) CALIFORNIA CESSION STATUTE QUALIFIED THE EARLIER (1872) CONSENT STATUTE, AND BY FAILING TO RECORD LAND DESCRIPTIONS AS REQUIRED BY THE 1897 STATUTE, THE UNITED STATES DID NOT ACQUIRE JURISDICTION AT CASTLE.

The Court may find, contrary to state officers' position, that a state's *unqualified* consent to the United States' purchase of land for military purposes results in a transfer of jurisdiction when the land is purchased by the government by reason of the pre-emptive effect of Constitution Article I, Section 8, clause 17. Such is not the case here, because the legislative consent in Political Code, Section 34 (Government Code, Section 111), was *qualified* by Statutes of 1897, Chapter 56, page 51 (Government Code, Section 114).

Admittedly, the United States failed to file land descriptions and Plats of Parcel A at Castle with the County Recorder of Merced County as required by the 1897 statute (Government Code, Section 114). R. 695, 700, 814. These filing requirements constitute a condition precedent to the transfer of sovereignty. *United States* v. *Watkins* (D.C.N.D. Calif. 1927), 22 F. 2d 437, 440; *Pothier* v. *Rodman* (C.A. 1), 291 Fed. 311, 319-321, rev'd. on other grounds, 264 U.S. 399 (1924); *Valley County* v. *Thomas*, 109 Mont. 343, 97 P. 2d 345, 360 (1939); *State* v. *Mendez*, 57 Nev. 192, 61 P. 2d 300, 303 (1936); *Six Companies* v. *DeVinney*, D.C.D.N., 2 F. Supp. 693, 699 (1933).

Political Code, Section 34 (Section 111) and the 1897 statute (Section 114) on January 3, 1944, the date of the government's notice of acceptance of jurisdiction (R. 320), provided:

> "111. The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article." Stats. 1943, Ch. 134, p. 898; based on 1872 Political Code, section 34, as amended Stats. 1939, Ch. 710, p. 2231.
>
> "114. The State cedes to the United States exclusive jurisdiction over all lands within the State, held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has

been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Stats. 1943, Ch. 134, p. 898; based on Stats. 1897, Ch. 56, p. 51.

The 1897 statute (Section 114) clearly includes lands "purchased" by the United States at Castle under Political Code, Section 34 (Section 111). "Ceded" in the 1897 statute (Section 114) referred to lands in California to which title was acquired from Mexico under the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, and which were in the federal public domain when California was admitted to the Union, Act of September 9, 1850, 9 Stat. 452. On the other hand, "conveyed" in the 1897 statute (Section 114) imports a purchase of land from a private landowner, i.e., refers to a transfer of legal title to land. See *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 630, 120 Pac. 15 (1911). Since the requirement that land descriptions be filed was enacted in 1897 (Stats. 1897, Ch. 56, p. 51), it is clear that it qualifies the earlier consent language in Section 111, first enacted in 1872 Political Code, Section 34.

The fact that both the 1872 and 1897 statutes were codified into the Government Code at the same time in 1943 (Stats. 1943, Ch. 134, pp. 898, 899) did not alter the then existing relation between the two stat

utes, namely the qualification of the 1872 statute by the 1897 statute and hence the continuing qualification of Government Code, Section 111, by Government Code, Section 114. Sections 111 and 114 in this respect are similar to the 1931 West Virginia statute considered in *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). This statute (Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia) provided in relevant part:

> "Sec. 3. *Acquisition of Lands by United States; Jurisdiction.* The consent of this state is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever, or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases." [Based on Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia].
>
> "Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the

United States for all purposes: . . ." [Based on Sec. 2, 1909 Acts of W. Virginia, Ch. 61, p. 494].

In its brief in *Draco*, the government argued that the consent granted by the first quoted paragraph ". . . apparently transfers exclusive jurisdiction to the United States," and that the second quoted paragraph ". . . was a separate enactment of a statute *ceding* jurisdiction, independently of Clause 17, and not as a qualification to the consent statute." Brief for the United States, Supreme Court of the United States, Oct. Term, 1937, Nos. 3, 7, 8, pp. 54, 60.

The court never reached the first contention, since it held that the phrase "any land so acquired" in the second quoted paragraph manifestly covered lands acquired by the United States with the state's consent granted in the first paragraph, and that the reservation of concurrent jurisdiction in the second quoted paragraph was controlling. *James* v. *Draco Contracting Co.*, 302 U.S. 134, 145-146. This reasoning should be dispositive of the instant case. Just as the phrase "land so acquired" was held to include lands purchased under the consent language in the West Virginia statute, so also the provision in Section 114 "all land . . . which may be . . . conveyed to the United States" applies to lands at Castle purchased with the consent granted in Section 111.

In its memorandum filed in this court, the Government sought to distinguish the *Draco* case on the ground that the 1931 West Virginia consent and cession provisions were separate paragraphs in one sec-

tion, while the California consent and cession provisions were in separate sections. Gov't. Br., p. 9. This attempted distinction is footless. The consent provisions in the first paragraph of Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia is a codification of the earlier 1881 statute [Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia], while the subsequent and controlling cession paragraph, added in 1931, was an amended version of 1909 Acts of West Virginia, Ch. 61, p. 494. The legislative history of the California enactments is similar. Government Code, Section 111, is a codification of the consent provisions of 1872 Political Code Section 34 (Stats. 1939, Ch. 749, p. 2234, as amended, Stats. 1943, Ch. 134, pp. 898, 1009), and as in *Draco*, is qualified by the later cession provisions of Statutes of 1897, Chapter 56, p. 51, as codified into Government Code, Section 114 (Stats. 1943, Ch. 134, pp. 898, 1009).

Such construction of the California statutes accords with the federal administrative interpretation adopted for other California installations. For example, the Office of Chief of Engineers, Army Corps of Engineers, Washington, D.C., stated in its Jurisdiction Summary of Camp Cooke, California, dated November 4, 1957:

> "An attempt was made by the Department of the Army to accept jurisdiction over the fee area by issuance of letter of acceptance by the Secretary of War on 6 January 1943 and acknowledged by the Governor as of 23 January 1943, designed to cover portions of various installations listed on Exhibit "A" attached thereto. This acceptance was

to be effective at 12:00 noon on 15 January 1943 and would have covered the entire fee area of this installation. This letter was intended to constitute formal notice of acceptance of jurisdiction by the Secretary of War for the United States as required pursuant to Act of Congress approved 1 February 1940 (54 Stat. 19, U.S. Code Title 40, Section 255). However, a description by metes and bounds and a map or plat were not filed in the office of record in the County in which the lands are situated (Santa Barbara) as required by the cession Statute of California.

"The Judge Advocate General expressed the opinion in 1st indorsement dated 23 October 1945 (SPJGR 1945 9595), that letters of acceptance unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient authority to vest jurisdiction in the United States over the lands intended to be covered thereby. This opinion was reaffirmed by 2nd indorsement dated 9 April 1954; file JAGR 1954 2153. The reaffirmation arose in connection with a consideration of Opinion No. 53-20[41] dated 8 January 1954 of the Attorney General of the State of California."

Similarly, the Office of Chief of Engineers, Army Corps of Engineers, Washington, D.C., stated in its Jurisdiction Summary of Sharpe General Depot, San Joaquin County, California, dated October 15, 1952:

"Although letters were addressed to the Governor of California accepting exclusive jurisdiction

[41] Opinion 53-20 January 8, 1954 was published as 33 Cal. Ops. Atty. Gen. 14 discussed *supra* at pp. 28-29.

over all lands acquired for military purposes within the state and over which jurisdiction had not previously been obtained, the office of the Judge Advocate General is of the opinion that these acceptances of jurisdiction should not be relied upon as vesting exclusive jurisdiction in the United States over such lands (SPJGR, 1945/9595, 23 October 1945). This opinion is based on the fact that a metes and bounds description and map were not filed as provided in the Act of 2 March 1897 (Calif. Stat. 1897, Ch. 56, which Act appeared as Section 114 of the California Government Code.)

"Accordingly, it must be concluded that Federal jurisdiction has not been acquired over any of the lands used in connection with this installation."

The trial court found that exclusive jurisdiction over Parcel A at Castle had been accepted by the United States by virtue of the letter dated January 3, 1944, sent by the Secretary of War to the Governor of California. 190 F. Supp. 645, 654. This letter stated in part:

". . . that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." R. 320.

Since this notice to the Governor was not accompanied by the filing of plats and land descriptions in the appropriate local offices of record, there is no way for California officials to determine just which particular

parcels of land were intended to be covered.[42] In particular, it gave the State no notice that the United States intended thereby to accept exclusive jurisdiction over Parcel A at Castle. And, in fact, the government's intention to accept such jurisdiction first became known to California upon the filing of its motion for summary judgment April 18, 1960. The conflicting claims of jurisdiction by California and the United States, which have arisen because of the failure of the government to accurately describe the land involved are avoided where the United States files land descriptions and plats as required by the California 1897 statute (Government Code, Section 114). Compare *State* v. *Tully*, 31 Mont. 365, 78 Pac. 760 (1904) with *United States* v. *Tully* (C.C.D. Mont.), 140 Fed. 899 (1905) where the accused escaped conviction because the state and federal courts could not agree on the jurisdictional status of the Fort Missoula Military Reservation.

For the reasons stated, it is submitted that the subsequent California cession statute [Gov. Code, Sec. 114; Stats. 1897, Ch. 56, p. 51] qualified the terms of the earlier consent statute (Gov. Code, Sec. 111, Political Code, Sec. 34), and that the United States by not filing land descriptions and plats at the time it gave notices of acceptance of jurisdiction, thereby

[42] There are 242 military installations in California occupying over 3,850,000 acres of land. R. 458-461. Travis Air Force Base alone is made up of 124 separately acquired parcels of land. R. 979-990. The aggregate number of parcels comprising these 242 installations must, therefore, run into the thousands.

failed to obtain cession of exclusive jurisdiction over Parcel A at Castle.

6. PARCEL A AT CASTLE WAS ACQUIRED PURSUANT TO SECTION 10 OF THE LANHAM ACT, 54 STAT. 1125, WHICH EXPRESSLY RECOGNIZED THAT STATE SOVEREIGNTY SHOULD CONTINUE OVER THE LAND SO PURCHASED.

The only parcel of land at Castle claimed by the government to be within exclusive federal jurisdiction, is Tract A, the 18.36 acre civilian housing unit, located just outside the main gates to the installation. R. 349, 381, 385; Gov't. Br., p. 12. Possession of parcel A was taken by the government on June 26, 1942, pursuant to a "right-of-entry" granted by the person in possession. R. 604, 640. On June 26, 1942, title to parcel A was vested in the Federal Farm Mortgage Corporation. R. 349, 493. By deed dated July 17, 1943, the Federal Farm Mortgage Corporation conveyed title to one Sheldon Phillips. R. 349, 556. Title to parcel A on the same day, July 17, 1943, passed to the United States under the previously executed deed dated April 6, 1943. R. 490; Calif. Civil Code, Sec. 1106; 190 F. Supp. 645, 654. The consideration for conveyance of title to parcel A was $2,500.00 (R. 554), which was paid out of funds appropriated under the Lanham Act, 54 Stat. 1125. R. 233, 381. See Opinion of the Corps of Engineers, U.S. Army, dated March 19, 1959, expressing the view that California exercises jurisdiction over parcel A by virtue of the restrictions in the Lanham Act. R. 380-381.

While originally under the control of the National Housing Agency (R. 229), administrative control of

this defense housing unit was passed to the Secretary of War effective September 1, 1942. R. 235. It provided that the status of the unit could be changed from temporary housing to permanent housing. Sec. 1, Lanham Act, as amended by the Act of January 21, 1942, 56 Stat. 11, 12. R. 235.

Section 10 of the Lanham Act provided:

> "Sec. 10. Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property."

This statute unequivocally states that the purchase of land with funds appropriated under the Lanham Act shall not deprive a state of either civil or criminal jurisdiction over such land. Section 10 of the Lanham Act in this respect is similar to Section 12 of the Act of March 1, 1911, 36 Stat. 961, which provided with respect to forest lands purchased by the United States:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, . . . the intent and meaning of this section being that the State wherein such lands are situated shall

Similar provisions in other Congressional statutes authorizing the acquisition of federal reservations are found in Section 1 of the Act of June 25, 1910, 36 Stat. 847, 848 (Government property); and in Section 355 of the Act of June 25, 1936, 49 Stat. 1925, 1926 (Indian lands); and other similar statutes.

not, by reason of such reservation or administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

In *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946), this Court held that "by this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands. . . ." The similar language in section 10 of the Lanham Act plainly was intended to preserve state jurisdiction over land purchased by the United States for housing projects under the Lanham Act. *Johnson* v. *Morrell*, 20 C. 2d 446, 452, 126 P. 2d 873 (1942).

The trial court, however, held that the transfer of administrative control of the housing project to the Department of War on September 1, 1942, under section 4 of the Lanham Act, removed from the project the restrictions prohibiting acceptance of jurisdiction in section 10. 190 F. Supp. 645, 654. Section 4 of the original 1940 act (54 Stat. 1127) provided:

> "When the President shall have declared that the emergency declared by him on September 8, 1939, to exist, has ceased to exist . . . (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest."

The original section 4 was repealed and a new section 4 enacted by Congress in 1942: Act of January 21,

1942, 56 Stat. 12. The new Section 4 read in relevant part:

> "It is hereby declared to be the policy of this title to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible . . . Provided further, that the [Federal Works] Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of this Act as may be considered to be permanently useful to the Army or Navy . . ."

The purpose of Congress in amending Section 4 was to insure that ". . . housing built under this legislation should be sold and disposed of by the Government as expeditiously as the public interest may permit. It was never considered by the committee that this housing should be designed for use as slum clearance projects or to provide subsidized housing for persons of low income." House Report No. 1457, 77th Cong., 1st Sess., p. 3. The exception to this requirement of prompt sale was the proviso authorizing transfer of administrative control of these housing projects to the Navy and War Departments for their *permanent* use. See statement of Senator Ellender, 87 Cong. Rec. 10028-10029. This legislative history shows that Congress, in amending *Section 4* of the Lanham Act, was concerned with the permanency of

these housing projects and their cost to the federal fiscal. In sharp contrast, *Section 10* had as its objective the preserving of local [illegible] police, health and education services for the [illegible]idents of these housing tracts. The 1942 amendments to Section 4 were therefore directed to the administrators of the housing project, while the provisions of Section 10 were intended to benefit the residents in the tract. Parcel A is now, as it has been since 1942, utilized as a civilian defense housing project. R. 349, 351. The sheriff of Merced County exercises criminal jurisdiction over offenses committed on the project. R. 351. The children of its residents attend the public schools operated by the Atwater Elementary School District. R. 351. Its residents now, as in 1942, are entitled to the state and local services which are available under local law. To be sure, a more serious question would be posed had the use of Parcel A been changed from civilian housing to, say, that of a runway at the airbase. This change in use has not occurred. It follows that the trial court erred in finding that the provisions of Section 10 of the Lanham Act were inapplicable to Parcel A at Castle.

7. CONTRACTORS DELIVERING MILK TO PARCEL A AT CASTLE ARE SUBJECT TO THE CALIFORNIA MILK STABILIZATION ACT SINCE THE STATE ACT WAS ASSIMILATED AS FEDERAL LAW. IF ARGUENDO, EXCLUSIVE JURISDICTION OVER PARCEL A PASSED TO THE UNITED STATES.

When the United States takes exclusive jurisdiction over land from a state, the laws of the original sovereign in effect at the time of the taking which are

not inconsistent with the laws of the United States, continue in effect as the laws of the succeeding sovereign until changed by the federal government. *Chicago, Rock Island and Pacific Railway* v. *McGlinn*, 114 U.S. 542, 546 (1885); *Ufuk* v. *Mojalia*, 220 U.S. 345, 357 (1911). This assimilation of the laws governing the rights of the occupants of the territory transferred insures that such an area will not be left without a developed legal system for private and public rights. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99 (1940).

In *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293 (1943), the court noted that regulatory laws such as the California milk stabilization act were assimilated as federal law upon a transfer of sovereignty, but that assimilation did not occur at the installation there involved (Moffett Field) because the state statute (Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42; Stats. 1937, Ch. 413, p. 1342; and Stats. 1937, Ch. 716, p. 1988) was enacted subsequent to the date that the government had secured exclusive jurisdiction.[*] The clear inference is left that the California

[*] In *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293, the court relied on *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), and on *Constitutional Milk Producers* v. *Parker*, 104 Cal. App. 815, 827, 287 Pac. 140, 142, and on the expressed view of counsel in assuming that California had made a cession of exclusive jurisdiction over Moffett Field. Both the *Standard Oil* and *Constitutional* cases involved the Presidio of San Francisco, where land descriptions and a plat had been filed with the county recorder's office under the California cession statute, Stats. 1897, Ch. 56, p. 51, and the Court apparently assumed that such filings had been made at Moffett. The facts at Castle are opposite since the government concedes that it has never filed land descriptions and a plat thereof as the under either the 1897

milk stabilization act would have remained in force at Moffett Field had the transfer of jurisdiction occurred after the enactment of the state statute in 1935.

Castle was acquired *subsequent* to the 1937 enactment of the milk statute (i.e., between July 17, 1943, to June 11, 1956; R. 352, 383-387) and the previously enacted milk stabilization act remained in force under the *Pacific Coast Dairy* case, assuming arguendo that a cession of jurisdiction was made over Castle. Since the stabilization act remained in force at Castle, California should have power to enforce the law against contractors making delivery to Castle. *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943).

The court below avoided reaching this conclusion by holding (1) that the California milk stabilization act conflicts with federal procurement policy, and (2) because, even if the state statute remained in effect at Castle, it could not be enforced by California officials against contractors delivering milk to Castle, but only by federal officials. 190 F. Supp. 645, 658-659.

In answer to the first ground, state officers point out as they have previously in this brief (*supra*, pp. 63-81) that the state milk stabilization acts do not conflict with federal procurement policy (*Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261) and that the California statute, as construed by the highest

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statute or its successor, Gov. C., sec. 114. R. 695, 700, 814. Further, state officers in this proceeding, unlike the *Pacific Coast Dairy* litigation involving Moffett Field, California, 318 U.S. 285, do not concede that the United States has exclusive jurisdiction over any portion of Castle.

state court, does not impose a prohibition on either the United States or its officers. *Pacific Coast Dairy v. Dept.*, 19 C. 2d 818, 830, rev'd. on another ground 318 U.S. 285 (1943).

The second ground given by the trial court is equally footless. Contractors with the United States do not enjoy immunity from state regulation either where the activity sought to be regulated occurs on land within state jurisdiction (*Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261) or on land where state law remains in force by assimilation. *Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99. And if such contractors cannot claim implied federal immunity, then such persons are subject to enforcement of the transitory cause of action in the state courts where substantial violations of law occur on land within state jurisdiction. *Stewart & Co. v. Sadrakula*, 309 U.S. 94; *Commonwealth v. Rohrer*, 37 Pa. D. and C. 410 (1937). *Johnson v. Yellow Cab Co.*, 321 U.S. 383 (1944), relied upon by the district court is inapposite. In this case, there was involved a state seizure of liquor in transit by a common carrier through the state to an officers' club located within an installation under exclusive federal jurisdiction. The court's decision invalidating the seizure was grounded on the fact that no state law purported to prohibit shipments through the state to an area under federal jurisdiction. In connection with the collateral question of the clean hands of the plaintiffs, who wanted the return of the seized liquor, the court refused to decide whether the

Oklahoma laws were assimilated so as to make illegal under federal law the receipt of the liquor on the installation. This refusal was based on the circumstance that the record consisted of stipulations between the common carrier and state officials to the effect that the seizure under state law was illegal and that the interests of the United States were not represented in the suit. 321 U.S. 394-392. The *Johnson* case is, therefore, no authority for the proposition that California cannot try its transitory cause of action in the state courts for violations of state law occurring in substantial part on areas within state jurisdiction. See *Osborn* v. *Ozlin*, 310 U.S. 53, 62-63 (1940); *Alaska Packers Assn.* v. *Comm.*, 294 U.S. 532, 541 (1935); *Skiriotes* v. *Florida*, 313 U.S. 69, 76-79 (1941).

8. THE DISTRICT COURT ERRED IN RELYING ON PACIFIC COAST DAIRY AS AN APPLICABLE AUTHORITY.

The district court erred in relying on the decision in *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943) as authority for holding the state milk stabilization act unconstitutional as applied to the Castle, Travis and Oakland installations. In *Pacific Coast Dairy* counsel for the State conceded arguendo, for the purpose of testing the point of law involved, that Moffett Field was a federal enclave subject to the "exclusive jurisdiction of the Federal Government" and that the State had no power to apply its wholesale milk price regulations to milk sold within the Moffett installation, citing *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934) and *Consolidated Milk Producers* v.

Parker, 19 C. 2d 815, 123 P. 2d 440 (1942). Brief for Appellees, *Pacific Coast Dairy* v. *Dep't.*, Supreme Court of the United States, Oct. Term 1942, No. 275, pp. 8, 22. But both the *Standard Oil* and *Consolidated Mill Producer* cases involved transactions occurring on the Presidio of San Francisco, where the government in 1913 had filed land descriptions under the 1897 statute. *United States* v. *Watkins*, (D.C.N.D. Calif. 1927), 22 F. 2d 437, 439. In contrast, the government concedes that land descriptions and plats were not filed under this 1897 statute for Parcel A at Castle. R. 349-350, 643. Therefore, the *Pacific Coast Dairy* case is no authority for the proposition that the United States exercises exclusive jurisdiction over Parcel A at Castle. Instead, the preceding sections of this brief show that California exercises jurisdiction over Parcel A and that *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943) is the controlling precedent.

C. California Exercises Jurisdiction Over the Travis Installation.

1. ACQUISITION AND PROCUREMENT HISTORY AT TRAVIS.

Travis Air Force Base, totaling 4131 acres, is located in Solano County, California. R. 806-817. While the court below held that the record "shows without contradiction" that the lands comprising Travis were acquired between December 1942 and March 1943 (190 F. Supp. 645, 652), the record plainly shows that these parcels were acquired by successive conveyance and

condemnation action from September 4, 1942, to June 17, 1958.[45] R. 806-817. No claim of jurisdiction over Travis is made by the government under Statutes of 1897, Chapter 56, page 54 (Government Code, Section 114), since no effort was made to file the land descriptions and plats of the land with the Solano County recorder as required by these statutes. R. 352, 644 Govt, Br. 9.

The district court found that jurisdiction over Travis passed to the United States on April 16, 1943, the date of a blanket notice accepting jurisdiction. 190 F. Supp. 645, 652; R. 374. The lower court's error in the dates of acquisition at Travis is material since over 95 parcels of land at Travis were acquired subsequent to April 16, 1943. R. 808-817. Contrary to the finding of the district court, state jurisdiction over these parcels is conclusively presumed under Revised Statutes Section 355, as amended by the Act of October 9, 1940, 54 Stat. 1083, assuming arguendo that jurisdiction could have been transferred to the United States in the first place under Political Code Section 34, as found by the district court.[46] *Adams* v. *United States*, 319 U.S. 312 (1943).

[45] The underlying facts in the affidavits and exhibits attached to the government's motion for summary judgment must be viewed in the light most favorable to appellant state officers. *United States* v. *Diebold*, 369 U.S. 654, 655 (1962).

[46] Parcels numbered 15, 25, 29, 37, 46B to 603-E-3, and the unnumbered parcels, R. 808-817. Parcels numbered 15, 25 and 37 were acquired after the blanket letter of April 16, 1943 (R. 374) and the most recent blanket letter of January 3, 1944 (R. 339). R. 979. Thus, no notice of acceptance of jurisdiction has been given at all at Travis over more than 93 of the parcels at Travis.

Milk is received for resale at the Travis Officers' Club located on parcel 47 (R. 644-645, 819-821) and is received for troop ration at Dining Halls numbers 6 and 7, and building 381 on parcel 49. (R. 819-821). Parcel 47 was acquired May 11, 1946 (R. 806), and parcel 49 was acquired May 26, 1946 (R. 806). Since these parcels were acquired subsequent to the notices of acceptance of jurisdiction dated April 16, 1943 (R. 374), and January 3, 1944, the date of the latest government acceptance of jurisdiction letter (R. 339), they a fortiori lie within the conclusive presumption of state jurisdiction even if the latter, rather than the earlier notice of April 16, 1943 (R. 374), is deemed controlling. *Adams* v. *United States*, 319 U.S. 312.

Milk is delivered to the Travis Post Exchange and to the Travis Commissary Store located on parcel 18-A (R. 644-645, 819-821), to the Noncommissioned Officers' Open Mess located on parcel 16 (R. 644-645, 819-821), to Dining Hall No. 1 located on parcel 17-A (R. 819-821), the No. 3083 Mess Hall located on parcel 13 (R. 819-821) and to the Cold Storage Building located on parcel No. 7. (R. 819-821). Parcels 7; 13, 16, 17-A and 18-A were acquired prior to the blanket notice accepting jurisdiction dated April 16, 1943 (R. 374) and are therefore within the disputed questions of jurisdiction discussed in connection with the status of parcel A at Castle. R. 806-807.

The contracts for the purchase of milk from appropriated funds were not executed by the contracting

officer at Castle but by higher military authority at another installation. R., 248, 272. Thus, only the delivery of milk to the commissary store and to the mess halls occurred on the installation, the sale of the milk occurring off the base, *United States* v. *Parcell Envelope Co.*, 249 U.S. 313, 319-320 (1919); *Garfield* v. *United States*, 3 Otto 242, 243 (1876).

2. AS AT CASTLE, THE LEGAL AND FACTUAL PATTERN FOR TRAVIS SHOWS THAT CALIFORNIA EXERCISES JURISDICTION OVER THE TRAVIS AIR FORCE BASE.

The district court found that exclusive jurisdiction over all of the parcels at Travis was transferred to the United States under Political Code, Section 34, as amended in 1939 (Stats. 1939, Ch. 710, p. 2231) as of April 16, 1943, by virtue of the blanket notice of acceptance of jurisdiction given on that date.[17] R. 374; 190 F. Supp. 645, 652.

The statutes, federal and state, applicable to Travis are the same as for Castle, with the exception that the record does not show if the housing tracts at Travis were acquired under the Lanham Act, 54 Stat. 1125. R. 821. The blanket letter accepting jurisdiction dated April 16, 1943 (R. 374), which the trial court mentioned in connection with Travis is similar to the later blanket letter dated January 3, 1944 (R. 339), which is related to Parcel A at Castle. Therefore, the statutory and factual analysis which establishes that Cali

[17] The text of this letter, dated April 16, 1943, is set forth in the appendix at p. 224

fornia exercises jurisdiction over Parcel A at Castle impels the finding that California exercises like jurisdiction over those few parcels (Nos. 1 to 14, 16 to 19, and 29) acquired at Travis prior to April 16, 1943, the date of the blanket letter of acceptance." R. 374. Of course, the many parcels acquired subsequent to the letter of April 16, 1943 (or the letter of January 3, 1944, if applicable) are conclusively presumed to be within state jurisdiction, there having been not even a notice given accepting jurisdiction over these parcels, quite apart from the failure of the government to observe the filing and recording requirements of the 1897 statute as codified in 1943 into Government Code, Section 114, or the later requirements, first enacted in 1946, of Government Code, Section 126, Revised Statutes, Section 355, as amended: *Adams* v. *United States*, 319 U.S. 312 (1943). Since all the parcels at Travis are subject to state jurisdiction, California may, therefore, constitutionally enforce its milk stabilization act against contractors delivering to such installation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

[1] Parcels 15, 25 and 37 at Travis were acquired between April 16, 1943 and January 3, 1944, the date of the latest blanket notice accepting jurisdiction (R. 339) and would fall in the class of disputed parcels of land at this latter notice were deemed controlling. R. 806.

D. California Exercises Jurisdiction Over the Oakland Army Terminal.

1. ACQUISITION AND PROCUREMENT HISTORY AT OAKLAND.

The district court found that "the record shows without contradiction" that the owned lands comprising the Oakland Army Terminal were acquired by the United States by condemnation proceedings in 1950, and that the United States exercises exclusive jurisdiction over the installation. 190 F. Supp. 645, 649. To the contrary, the record shows that a portion of the installation is leased (122.4 acres) and a portion owned in fee (478.6 acres).[49] R. 149, 639. The portion owned in fee, consisting of parcels A-114, B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306 was not acquired solely in 1950 but was acquired by successive purchase and condemnation between January 15, 1941 to September 11, 1953. R. 368, 639; see parcel history set out in the appendix at pp. 231-232. Parcels A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, A-131, A-115-2 and A-119-2 are leased. R. 149, 639.

The Secretary of the Army apparently had come to the conclusion in 1945 that the government's previous blanket notices of April 16, 1943 (R. 374) and of January 3, 1944 (R. 339) accepting "exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which

[49] As at Travis, since there was no trial on the facts, the rule that trial court findings of fact shall not be set aside on appeal unless clearly erroneous has no application. Rule 52(a), Federal Rules of Civil Procedure.

has heretofore vested in the United States'. . . " were invalid because the lands affected had not been identified by the filing of land descriptions and plats as required by the State 1897 cession statute (Government Code Section 114). Judge Advocate General opinion SPJGR 1945 9595, dated October 23, 1945. See JACK 1954 2153, dated April 9, 1954. Thereafter, the Secretary of the Army on April 21, 1949, again gave notice to the Governor of California that jurisdiction over 478.75 acres of land at Oakland was accepted by the United States "subject to each and all of the conditions and reservations prescribed in Chapter 1532, Statutes of California, 1947 (Section 126, Government Code)." R. 372. Upon discovery that this notice did not comply with California law, the Secretary of War on July 5, 1950, filed an application with the California State Lands Commission requesting "a public hearing by the Commission to determine whether the conditions and reservations respecting consent to the acquisition by the United States of the following described land in the State of California have been met: [metes and bounds description omitted]." R. 368. The application further stated: "The Department of the Army, in behalf of the United States of America, hereby assents to acceptance of federal jurisdiction over the subject land . . . upon and subject to each and all of the conditions and reservations prescribed in said California Government Code Section 126 . . ." R. 368. After a public hearing, the California State Lands Commission on October 5, 1950, adopted a reso-

lution finding that the conditions precedent to the granting of state consent to acquire these lands in Section 126 had been met and that "such acquisition is in the interest of the State." R. 140, 138.

The property description in the notice of July 5, 1950, included a portion of parcel A-114 (excluding an area of 123.33 acres acquired September 11, 1953; R. 93-94; see appendix, p. 281). Also included were the federally owned tracts B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306. R. 368. The United States, therefore, could not have obtained exclusive jurisdiction over the said 123.33 acre portion of parcel A-114, nor over parcels A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, and A-131, A-115-2 and A-119-2 which are leased. This is so because the government has never given notice of acceptance of jurisdiction over these parcels. It is noted that the notices of April 16, 1943, and January 3, 1944, accepted jurisdiction only over parcels owned in fee by the United States and that the notice of April 21, 1949, accepted jurisdiction only over the 178.6 acres owned in fee on that date at Oakland. R. 330, 372, 374. State jurisdiction is therefore effectively presumed over these leased parcels under Revised Statutes, Section 355, as amended. *Adams v. United States*, 319 U.S. 312 (1943).

The offers of contractors to furnish milk to be Oakland commissary store and troop messes were accepted in writing at Fort Mason located in San Francisco. R. 39. The sale of the milk, in the scope that

the property interest in the milk was to be subsequently transferred to the government by virtue of the written contract, therefore occurred in San Francisco and not within the Oakland Army Terminal. *United States v. Parcell Envelope Co.*, 249 U.S. 313, 319-320 (1919); *Fairfield v. United States*, 3 Otto 242, 243 (1876).

Milk is delivered for resale at the Oakland Officers' Club located on leased parcel A-119, R. 647. As noted, since no notice accepting jurisdiction over parcel A-119 has been given by the government, state jurisdiction as to the parcel is conclusively established, and in any event the parcel is leased, not owned, by the United States. Milk is also delivered for resale at the Oakland Post Exchange, the restaurant, the commissary and for home ration on parcel B-210, R. 545-549, 647. Title to parcel B-210 was acquired by conveyance March 2, 1942 and was included in the lands described in the government's application to the California State Lands Commission dated July 6, 1950, R. 569, 939.

THE CALIFORNIA LEGISLATURE IN ENACTING GOVERNMENT CODE, SECTION 96, DID NOT THEREBY EFFECT A TRANSFER OF EXCLUSIVE JURISDICTION OVER OAKLAND TO THE UNITED STATES

The district court held that California could not enforce its milk stabilization act against contractors delivering milk to the Oakland Army Terminal because the State had given its consent to Government

Code Section 126[39] to the acquisition of certain of the parcels at Oakland. 190 F. Supp. 645, 652. The trial court noted that Government Code, Section 126, makes express reference to Constitution Article I, Section 8, clause 17, which it characterized as dealing "specifically with the acquisition by the United States of 'exclusive legislative jurisdiction,' over lands purchased by the United States . . . with the consent of the legislature of the State." 190 F. Supp. 645, 650.

The court below thereby misquoted clause 17 which does not contain the phrase "exclusive legislative jurisdiction." Instead, clause 17 gives Congress power to exercise "exclusive legislation" over lands purchased by the United States for military purposes. This power in Congress to legislate over such lands was thereby confused in the lower court's mind with a cession by a state of exclusive jurisdiction.

The language of Section 126, as amended by Statutes of 1947, Chapter 1532, page 3163, read:

> "126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:
>
> "(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within

[39] Gov. Code, Sec. 126, as enacted Stats. 1st Ex. Sess. 1946, ch. 154, p. 199, and as amended Stats. 1947, ch. 1532, p. 3163, are set forth in the appendix at pp. 204 and 216.

> the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911, (36 Stat. 961) known as the 'Weeks Act'; . . ."

No words of cession of jurisdiction appear in the statute, and, therefore, the Legislature intended to do no more than to give the state consent required in clause 17 before Congress can exercise the powers of "exclusive legislation" over such land.

This power to exercise exclusive legislation is the same power mentioned in Article I, Section 2, clause 1, of the Constitution which grants "all legislative power granted herein" to the Congress. This authority to legislate, like the power to regulate commerce between the states, is not *per se* pre-emptive as applied to local matters and is effective only as Congress chooses to avail of it. See *Parker v. Brown*, 317 U.S. 341, 361-363 (1943), and the discussion of Political Code section 34, supra p. 89. In contrast a cession of jurisdiction has been held to transfer the state authority over the land involved to the United States. Thus, for example, a cession of jurisdiction over the Presidio of San Francisco occurred in 1913 when the government filed land descriptions and a plat of the installation with the San Francisco Recorder's Office pursuant to California Statutes of 1897, Chapter 56, page 51. *United States v. Watkins*, (D.C.N.D. Calif. 1927), 22 F. 2d 437, 439.

The trial court supported its statement that exclusive jurisdiction can be transferred by a state statute, which consents to the federal purchase of land, but which is not in the form of a cession, by asserting (1) that it was originally believed that jurisdiction could only be acquired by a state consent statute, and (2) that "cessions" of jurisdiction were not recognized until the 1885 decision in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 190 F. Supp. 645, 651. The 1808 decision of Mr. Chief Justice Marshall in *Young v. The Bank of Alexandria*, 4 Cranch, 384 (1808) is inapposite. In 1789 Virginia had ceded "exclusive jurisdiction" over an area of land to the United States for use as the center of government with a reservation of state jurisdiction until Congress ". . . shall by law provide for the government thereof . . . ."

Hening's Va. Stats. 1789, Vol. 13, Ch. 32, p. 33. Congress accepted the cession of jurisdiction but provided that Virginia laws should continue in effect until "Congress shall otherwise by law provide." Act of July 16, 1790, 1 Stat. 130. In the *Young* decision, it was held that "under the terms of the *cession* and acceptance of the district, the power of legislation remained in Virginia until it was exercised by Congress." (Emphasis added.) 4 Cranch 384, 397. Thus, contrary to the view of the trial court, transfers of jurisdiction by cession with reservations of state power were recognized early in United States history. The isolated statement, cited by the court below (190 F.

Supp. 645, 651 ; from *United States v. Railroad Bridge Company* (6 A.N.D. Ill. 1855), 27 Fed. Cas. 686, 690, that a state consent to purchase constitutes a cession of jurisdiction, was *obiter dictum* since the land there involved (Fort Armstrong, Ill.) had not been purchased, but had been set aside from the public domain since 1812, and was so held when Illinois became a state in 1818, Joint Resolution of December 3, 1818, 3 Stat. 536. The decision in the case was that the bridge company, with consent of the State of Illinois, could construct a railroad bridge across the federally-owned land.

There remains the question regarding the effect to be given the provision in Section 12(c) (Stats. 1st Ex. Sess. 1946, Ch. 154, p. 1199) that "The United States must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed: . . ." No language of cession appears in this subsection which therefore means only that the United States, or its agencies, must agree that the land involved should become subject to the legislative power in Congress under Article I, Section 8, Clause 17. Appellants have argued that Clause 17 is not pre-emptive of state authority except as this power is exercised by Congress. If this construction is correct, then California exercises jurisdiction over Oakland since Congress has not chosen to exercise its legislative power. It is noted that the construction of this subsection made by the trial court was not

accepted by the California Legislature which changed the wording from "(c) The United States must in writing have assented to acceptance of jurisdiction over the land . . ." to "(c) The United States must in writing have requested state consent to acquire such land. . . ." Stats. 1961, Ch. 966, p. 2607.

The provisions in former 126(c) that the United States must have given assent to the acceptance of jurisdiction must be read with the provision in subsection 126(a) that the acquisition must be for military purposes "or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911 (36 Stat. 961), known as the 'Weeks Act.'" Stats. 1947, Ch. 1532, p. 3163. Section 12 of the federal act expressly provides:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by the permanent reservation and administration as national forest lands, . . . the intent and meaning of this section being that the State wherein the land is situated shall not, by reason of such reservation and administration, lose its jurisdiction. . . ." 36 Stat. 963.

Statutes should not be construed so as to be meaningless. Yet, this is the very result if the Legislature is found to have required federal acceptance of jurisdiction over forest lands purchased with state consent, with knowledge of the judicial interpretation that federal acceptance of jurisdiction is prohibited.

Wilson v. *Cook*, 327 U.S. 474, 486 (1946). A reconciling construction is that Section 126 was not intended by the California Legislature to transfer exclusive jurisdiction to the United States, but instead was intended only to place the land involved under the legislative control of Congress under clause 17.

3. CALIFORNIA RESERVED ITS CRIMINAL AND CIVIL JURISDICTION OVER OAKLAND, BECAUSE OF THE RESERVATIONS IN GOVERNMENT CODE, SECTIONS 113 AND 126.

The Court may not agree with state officers' construction of clause 17 and may find that a state's *unqualified* consent to purchase land for military purposes results in a transfer of state jurisdiction when the land is actually conveyed to the United States by reason of the pre-emptive effect of Constitution Article I, Section 8, clause 17. Notwithstanding, California retains criminal and civil jurisdiction over Oakland because of express qualifications to the state's consent made in Government Code, Sections 113 and 126.

The California Legislature in enacting Government Code Section 126 granted consent to the acquisition of land by the United States "upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law*. . . ." (Emphasis added.) Stats. 1947, Ch. 1532, p. 3163. This reference to "any other conditions or reservations" in Section 126 clearly has reference to the reservation of "the administration of the criminal law of the State with respect to any land over which *any jurisdiction* has

been or may be ceded or conveyed to the United States . . ." set forth in Government Code Section 113 (emphasis added). Stats. 1947, Ch. 1532, p. 3163. The interrelation of Sections 113 and 126 is made clear by the fact that both sections were amended by Chapter 1532 of the 1947 California Statutes. Senate Bill 656, which later became Chapter 1532, as originally introduced in the California Senate on January 29, 1947, amended Section 126 to provide that the public hearing and findings required by the statute should be made by the State Lands Commission rather than by the State Board of Equalization. The bill was amended in the State Senate on May 16, 1947, in two respects: Section 126 was amended to give state consent to the federal acquisition of forest lands under the Act of March 1, 1911, 36 Stat. 961, and Section 113 was amended to strike language of cession of jurisdiction, and to add language reserving the administration of the criminal laws of the state "with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States." California Senate Journal, 1947, Vol. 2, pp. 2166-2167.[21]

The district court correctly held that the phrase "other conditions or reservations prescribed by law" in Section 126 incorporated the reservation of state criminal jurisdiction made in Section 113, but fell

[21] Senate Bill 656, as introduced into the Legislature January 29, 1947, and as amended in the State Senate May 16, 1947, is set forth in the appendix at pp. 213-218. 1947 California Senate Bills Nos. 576-675, California State Library. Section 113 as enacted by Stats. 1943, Ch. 134, p. 898, and as amended, Stats. 1947, Ch. 1532, p. 3164, is set forth in the appendix at p. 211.

into error in limiting the application of Section 113 "to lands 'ceded' to the United States, as distinguished from lands acquired through purchase or condemnation by the United States with the State's consent—as in the case of these Oakland Army Terminal Lands." 190 F. Supp. 645, 651.

Section 113, as amended by Statutes of 1947, Chapter 1532, page 3164, reserved state criminal jurisdiction "with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States. . . ." It follows, that if, as found by the district court, jurisdiction was ceded to the United States over federally-owned parcels at Oakland under Section 126, there was reserved from that grant the state's criminal jurisdiction over such parcels.

On the other hand, Statutes of 1891, Chapter 181, page 262, and its successor Section 113, as enacted by Statutes of 1943, Chapter 134, page 898, and as amended Statutes of 1947, Chapter 1532, page 3164, also reserved state criminal jurisdiction over lands "conveyed" to the United States. The term "conveyed" when used in referring to real property imports a purchase of legal title. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 630, 120 Pac. 45 (1911). And a "purchase" of land by the government includes acquisitions by both deed of conveyance and by judgment in condemnation. *Kohl v. United States*, 1 Otto 363, 374 (1876). Therefore, when the United States obtained title by conveyance and by condemnation over certain of the parcels at Oakland, it took these

parcels subject to the statutory reservation of the state's criminal jurisdiction. Thus there was reserved from the consent that Congress have the power to exercise exclusive legislation over such parcels under clause 17, the state's power to exercise jurisdiction over crimes committed on such parcels.

It is noted that the State Legislature in amending Section 113 in 1947 (Stats. 1947, Ch. 1532, p. 3164), dropped from the section all language of cession of jurisdiction, and rearranged the 1943 language so that instead of reserving criminal jurisdiction "over such land as has been or may be ceded or conveyed to the United States . . ." (Stats. 1943, Ch. 134, p. 898), Section 113 now reserved criminal jurisdiction over "any land over which any jurisdiction has been or may be ceded or conveyed to the United States. . . ." But in the context that land, instead of jurisdiction, is ceded by one sovereign to another, and that the same California Senate Bill (No. 656, 1947 legislative session) amended both Sections 113 and 126, it is plain that the Legislature intended to reserve the State's criminal jurisdiction over "any land" passing by virtue of Section 126 within the congressional power to exercise exclusive legislation.

Contrary to the trial court's opinion that the 1891 reservation of jurisdiction (Section 113) did not qualify the terms of the 1872 consent to purchase statute (Section 126), this Court in an analagous case held that the reservation of concurrent jurisdiction

in a state cession statute qualified the language in an earlier consent to purchase statute, thereby also qualifying the power in Congress to exercise exclusive legislation over such purchased lands under Constitution, Article I, Section 8, clause 17. In *James v. Dravo Contracting Co.*, 302 U.S. 134, 143 (1937), the court held that the provision in a 1931 West Virginia statute reserving "concurrent jurisdiction" (added in 1931) qualified an 1881 provision in the same statute granting state consent to the government to purchase land for government purposes. Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia; Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia.[32] Similarly, the 1947 amendment to Section 113 reserving the administration of the criminal law of the state (Stats. 1947, Ch. 1532, p. 3164) qualified the earlier 1946 consent language in Section 126, Stats. 1st Ex. Sess., 1946, Ch. 154, p. 199.

The government suggests, though, that the reservation in Section 113 reserving "the administration of the criminal laws of the State" did not effect a reservation of state criminal jurisdiction but reserved only the right to serve criminal process. Gov't Br. 11. This contention is footless since the history of the provision clearly shows that both the Congress and the California Legislature intended the phrase to reserve state criminal jurisdiction over crimes committed on such federally owned property.

[32] Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia and Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia are set forth in the appendix at pp. 226 and 227.

The language first appeared in Statutes of 1891, Chapter 181, page 262 (eff. March 21, 1891),[53] and was enacted in response to a condition attached by Congress in statutes appropriating money for the acquisition of sites and the construction of post office buildings in California. For example, the Act of February 28, 1885, 23 Stat. 336, appropriated $100,000.00 for site acquisition and construction costs of a post office building at Sacramento, California, provided "that no money appropriated for the purpose shall be available . . . until the State of California shall have ceded to the United States exclusive jurisdiction over the same . . . for all purposes except the administration of the criminal laws of said State and the service of civil process therein." Identical conditions were contained in acts appropriating money for site acquisition and construction costs for post office buildings in Stockton, California (Act of January 12, 1891, 26 Stat. 711) and in San Jose, California (Act of April 28, 1890, 26 Stat. 73). The United States Attorney General had given his opinion in 1893 that the identical phrase in congressional acts appropriating money for public buildings[54] ". . . left to the State the administration of its criminal laws over the premises acquired by the

[53] The provisions of Statutes of 1891, Chapter 181, page 262, are set forth in the appendix at p. 210.

[54] Identical provisions reserving state criminal jurisdiction appeared in the Acts of: May 26, 1880, 21 Stat. 142; May 25, 1882, 22 Stat. 94; July 7, 1882, 22 Stat. 152; July 12, 1882, 22 Stat. 161; January 13, 1885, 23 Stat. 282; March 3, 1887, 24 Stat. 544; August 21, 1888, 25 Stat. 444; April 26, 1890, 26 Stat. 66; May 16, 1890, 22 Stat. 114; and January 21, 1891, 26 Stat. 724.

General Government, and consequently the cognizance of offenses against its laws committed hereon, as fully as the same existed before such acquisition." 20 Ops. Atty. Gen. 611, 613 (June 7, 1893); accord 8 Ops. Atty. Gen. 418, 419 (February 27, 1857); 24 Ops. Atty. Gen. 617, 619 (April 16, 1903); 31 Ops. Atty. Gen. 265, 267-268 (April 8, 1918). Thus, at the time the Legislature enacted the 1891 statute, it understood that the statute reserved to California the power to enforce its criminal laws with respect to offenses committed on such lands.

In *Bowen* v. *Johnston*, 306 U.S. 19, 28-29 (1934), it was held that the provision in a Georgia cession statute (1 Ga. Laws, 1890-91, p. 199) "that the State shall retain its . . . criminal jurisdiction over persons and citizens in said ceded territory . . ." reserved to the State of Georgia criminal jurisdiction over the Chickamauga and Chattanooga National Park. And in *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 527 (1938), the statement is made that "As the Act of March 31, 1891 (Calif. Stats. 1891, Ch. 181, p. 262), was then in force, . . . exclusive jurisdiction, with the exception of the right to administer criminal laws and serve process, passed to the United States, on its acceptance . . ." of the recession of Yosemite Valley and the Mariposa Big Tree Grove, made by California in Statutes of 1905, Chapter 60, page 54. Plainly, therefore, this same reservation in Section 113, the codified successor to the 1891 statute, saved to the State the power

to enforce its criminal laws with respect to offenses committed on these parcels at Oakland.

The rational of the contrary ruling in *United States* v. *Watkins* (D.C.N.D. Calif.), 22 F. 2d 437 (1927), cited by the government (Gov't. Br. 11), was overruled by *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). The issue in *Watkins* was whether the district court had criminal jurisdiction over a homicide committed within the Presidio of San Francisco. Had the district court there recognized the State's reservation of criminal jurisdiction in the 1891 statute as had the United States Attorney General (e.g. 8 Ops. Atty. Gen. 418, 419 (February 27, 1857); 20 Ops. Atty. Gen. 611, 613 (June 7, 1893); 24 Ops. Atty. Gen. 617, 619 (April 16, 1903); 31 Ops. Atty. Gen. 265, 267-268 (April 8, 1918)), it would have been ousted of jurisdiction since under Revised Statutes, Section 5339, the district court's power extended only to homicides committed on lands under the "exclusive jurisdiction of the United States." To avoid this problem, the court adopted the *obiter dictum* in *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 534, 537-538 (1885) that a state cannot qualify its cession of jurisdiction, and interpreted the phrase "administration of the criminal laws of this State" as though it read "service of criminal process." 22 F. 2d 437, 438-439. This *dicta* in the *Leavenworth* case was expressly disapproved in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146-147 (1937), and the erroneous construction of the statute in *Watkins* must give way to the rule of *Bowen* v. *Johnston*,

306 U.S. 19, and *Collins* v. *Yosemite Park Co.*, 304 U.S. 518.

For the reasons stated, California plainly exercises criminal jurisdiction over offenses committed on the Oakland Army Terminal, and the State may enforce the penal provisions of the milk stabilization act against contractors delivering milk to the installation. Agr. Code, Sec. 4410. See *Commonwealth* v. *Rohrer*, 37 Pa. D. and C. 410 (1937), where a contractor was criminally prosecuted for selling milk to the Veterans Hospital at Coatesville, Pennsylvania, in violation of the Pennsylvania milk stabilization act.

Section 126 reserved in addition to the State's criminal jurisdiction under Section 113, "the State's entire power of taxation" and reserved "to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given." These reservations of state jurisdiction are also antithetical to the finding that "exclusive jurisdiction" was transferred over Oakland to the United States. See *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946).

With presumed notice that the state cession of "jurisdiction" transfers only concurrent, civil and criminal jurisdiction instead of exclusive jurisdiction (*In re Kelly*, C.C.E.D. Wis., 71 Fed. 545, 552-553 (1895), the Secretary of War in his notice of April 21, 1949 (R. 372), and in his application for state consent to acquire these parcels dated July 5, 1950 (R. 368), stated that the government accepted "jurisdiction"

over these certain parcels at Oakland. As contrasted to the earlier blanket notices accepting "exclusive jurisdiction" (R. 339, 374), this letter accepting *concurrent* jurisdiction under Revised Statutes Section 355, as amended, was tacit recognition that Sections 113 and 126 reserved state criminal and civil jurisdiction over these parcels at Oakland. The court below, therefore, erred in enjoining enforcement of the state statute as applied to contractors delivering milk to Oakland since California exercises state jurisdiction over the Castle installation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

Lastly, if jurisdiction over Oakland was transferred to the United States on October 5, 1950, as found by the trial court (190 F. Supp. 645, 650-652), then the previously enacted 1935 California milk stabilization act was assimilated at Oakland, thus allowing state enforcement of the act against contractors delivering milk to the installation. *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293 (1943); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99 (1940).

III. CALIFORNIA CAN CONSTITUTIONALLY ENFORCE ITS MINIMUM DAIRY FARMER MILK PRICE REGULATIONS AGAINST CONTRACTORS BUYING FROM DAIRYMEN AND RESELLING TO THE UNITED STATES.

The district court enjoined enforcement of the state's minimum milk producer price regulations against contractors buying milk from dairy farmers where such milk was subsequently delivered to the

Castle, Travis and Oakland reservations. R. 66a, 68a. Analysis of the grounds for decision given by the trial court show that they do not justify the action taken. For example, it found that Agricultural Code, Sections 4280(f) and 4361,[13] imposed and unconstitutional prohibition on the Federal Government. 190 F. Supp. 645, 657. But these sections by their express terms pertain only to wholesale and retail minimum milk prices. The trial court also held that the state's minimum wholesale milk price regulations could not be constitutionally enforced against contractors delivering milk to the Castle, Travis and Oakland installations because these bases were located on land within exclusive federal jurisdiction. 190 F. Supp. 645, 648, 654. Yet neither of these trial court conclusions should be applied (although the district court did so) to the state's minimum milk producer regulations which impose price control at the point where the producer transfers either possession or the property interest in the milk to the handler. *United Milk Producers* v. *Cecil*, 47 C.A. 2d 758, 768-769, 118 P. 2d 830 (1941). The transaction controlled by state law, therefore occurs at the dairy ranch or at the handler's processing plant and not on the military reservation, and, therefore, plainly takes place at a point within state jurisdiction. This conclusion applies with equal force, of course, to the distributor's sale of fluid milk to the government which often takes place on what is un-

[13] Calif. Agr. Code, Sec. 4280(f) and 4361 are set forth in footnotes 13 and 14, *supra*, p. 56, and in the appendix at pp. 186 and 196.

questionably state territory although delivery may later be made at the federal installation.

In a comparable situation, the Court held that the Pennsylvania milk producer price regulations could constitutionally be enforced against a handler who, after purchasing in Pennsylvania, shipped the raw milk in interstate commerce for resale in New York City. *Milk Board* v. *Eisenberg Co.*, 306 U.S. 346 (1939). The burden imposed by the state regulation was deemed constitutionally permissible under the Commerce Clause because: "If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable." 306 U.S. 346, 353. The applicability of this premise to the California stabilization act is obvious since the government purchases 6 percent of the state's supply of milk. R. 348.

In its brief, in this Court, the government conceded "as a matter of procurement policy" that these dairy farmer price regulations may be validly enforced against contractors buying milk from California dairymen and reselling to the United States. Gov't. Br. 5. This position was also taken in *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943), where the government raised no question "as to the right of Pennsylvania to fix prices at the producer-distributor level for milk which ultimately is sold to

the United States." Brief for the United States, *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, Supreme Court of the United States, Oct. Term, 1942, No. 399, p. 2, fn. 1. These concessions acknowledging the constitutionality of state milk producer price regulations, reflect congressional policy to assure a stabilized annual production of adequate supplies of milk in the United States and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment. Sec. 204(a), Agricultural Act of 1954, 68 Stat. 899. It follows that the California minimum milk producer price regulations are constitutional as applied to contractors reselling to the United States, irrespective of the jurisdictional status of the contested parcels of land at the Castle, Travis and Oakland installations where delivery of the milk is made. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

IV. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN PROCEEDING TO ENTER FINAL JUDGMENTS WITHOUT TRIAL OR THE TAKING OF EVIDENCE AND THE JUDGMENTS MUST BE REVERSED.

In action 39030 (Oakland) filed March 30, 1960 (R. 7), the district court by *ex parte* restraining order enjoined the continuance of the state's enforcement action filed in the state court (Alameda County, Superior Court of California) the previous February 15, 1960. Notwithstanding state officers' objections and denials that the United States exercises exclusive juris-

diction over Oakland and that irreparable injury was threatened as set forth in the affidavits and by answer (R. 156, 183, 197, 341, 657, 661), the district court on motion for preliminary injunction entered final judgment holding the statute unconstitutional as applied without trial or the taking of evidence. R. 666; 190 F. Supp. 645, 659-660. However, the issue before the trial court on motion for preliminary injunction was not the constitutionality of the state enactment, but whether the state court proceedings would result in such irreparable injury to the United States that preliminary injunction should issue pending a trial on the merits. *Mayo* v. *Canning Co.*, 309 U.S. 310, 316 (1940). Similarly, the final injunctions issued April 17, 1961 (R. 668), in action No. 39073 (Castle and Travis) restrained state officers from proceeding in the District Court of Appeal for California to obtain appellate interpretation of the state statutes applicable to the Castle installation. R. 550, 656. As in action No. 39030, state court jurisdiction first attached to the controversy since the Superior Court action was filed February 5, 1960 (R. 790), while the government's injunctive action for milk delivered to Castle was filed March 22, 1960. R. 192. Thus the district court on motions for summary judgment closed the doors of the state courts to the State despite the denials by state officers' answers and affidavits that (1) California had ceded exclusive jurisdiction to the United States over

Castle and Travis, and (2) that the state's enforcement actions in the state courts threatened irreparable injury to the government. R. 156, 183, 197, 355, 521, 620, 657, 661. In the context of the serious errors of fact made in the lower court's findings, the denials made in state officers' answers and affidavits present triable issues of fact which the trial court should have resolved only after trial. *Colorado v. Toll*, 268 U.S. 228, 231-232 (1925); *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50-51 (1941). Further, the precipitous action of the district court violated the principle that, absent express authorization by Congress, "the Federal Court cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Ex parte Young*, 209 U.S. 123, 162 (1908); *Wilson v. Schnettler*, 365 U.S. 381, 384 (1961).

V. THE DISTRICT COURT ERRED IN ENTERING FINAL JUDGMENT WITHOUT AWAITING A PENDING CONSTRUCTION BY THE STATE COURTS OF APPLICABLE STATE LAW.

On the date of the trial court's judgments there was pending in the state appellate courts the same issues as are posed here. *Waring v. Milk Producers Ass'n.*, District Court of Appeal of California, Third Appellate District, No. 10485. R. 550, 656. Notwithstanding this pendency, the district court on motion for preliminary injunction in action No. 39030 and on motion for summary judgment in action No. 39073, held the state act unconstitutional, as ap-

plied on the basis of *its construction* of (1) the state milk stabilization act, (2) of the state statutes consenting to the federal purchase of land, and (3) of the cession of jurisdiction statutes.

Martin v. *Creasy*, 360 U.S. 219 (1959), provides a statement of the general scope of the doctrine of abstention. There, the court stated that "The concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." 360 U.S. 219, 224. Such conflict appears in full measure in this case where the court below construed the state milk stabilization act to "place a prohibition on the Federal Government" (190 F. Supp. 645, 657) in direct conflict with the decision of the Supreme Court of California that the milk stabilization "act regulates not the army but the distributors." *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830 (1942), rev'd. on another ground, 318 U.S. 285 (1943). Conflict between the state and federal courts is also shown by the district court adjudging that the United States exercises exclusive jurisdiction over Castle Air Force Base (190 F. Supp. 645, 653), while the Superior Court of the State of California for the County of Merced, ruled that California exercises jurisdiction over Castle. *Warne* v. *Milk Producers Association*, Merced County, Superior Court of California, No. 28301. R. 550. Further, the foregoing

sections of this brief plainly show that substantial constitutional questions regarding the proper construction of these state statutes are posed here which should not have been resolved by the district court on the basis of preliminary guesses regarding local law. *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944). This danger is illustrated by the decision in *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758, 769 (1938), where the Supreme Court of California refused to follow the interpretation of the California statutes dealing with the transfer of jurisdiction over Yosemite Valley to the United States made in *Yosemite Park Co.* v. *Collins*, D.C.N.D. Calif., 1937, 20 F. Supp. 1009. The district court was thereupon reversed, *sub nom. Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938), the Supreme Court of the United States reaching the same conclusion as had the Supreme Court of California.

Abstention from the exercise of jurisdiction is appropriate here because the interpretation of the milk stabilization act is a local issue as to which the state court's decision is binding on the federal courts. *Am. Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596 (1946). While the interpretation of the state's consent to purchase land and cession of jurisdiction statutes may constitute a federal as well as a local question, yet in the resolution of such question the federal courts in order to promote state-federal relations "give great weight to the views of the state court as

to the intent and limitations of the statute in granting consent and cession." *Mason Co.* v. *Tax Comm.*, 302 U.S. 186, 207 (1937). If the California milk stabilization act does not constitute a prohibition on the United States or its officers, then the court need not reach the issue of the constitutionality of the state milk act under *Calif. Comm'n.* v. *United States*, 355 U.S. 534 (1958). And if California exercises state jurisdiction over the Castle, Travis and Oakland installations, then no issue would be posed as to the constitutionality of the state milk stabilization statute under *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943). Thus, abstention from the exercise of jurisdiction is appropriate in these actions.

There is now pending a motion to remand to the Superior Court of California, the action for declaratory judgment *People* v. *Cuno*, United States District Court, No. Dist. of Calif., So. Div., No. 39080. This action, which names the procurement officers at Castle and Travis as defendants, was originally filed in the Superior Court of California for Solano County, and asks that the Superior Court interpret the state milk stabilization act, the State's consent to purchase land statute, and the cession of jurisdiction statute in the light of the federal constitutional objections raised by the government. A remand of this declaratory judgment action to the state courts, while the district courts stays its hand in the instant actions, would

expose these enactments to state court construction, or limiting interpretation, before the federal courts pass on the constitutionality of the State's milk stabilization act. See *Leiter Minerals, Inc.*, v. *United States*, 352 U.S. 220, 228-230 (1957). In the alternative, the government may deem it more expeditious to intervene in the cases now in the California appellate courts in which these same issues are posed. *Warne* v. *Mill. Producers Ass'n.*, District Court of Appeal, Third Appellate District, No. 10185 (Castle Air Force Base); *Paul* v. *Allied Dairymen, Inc.*, District Court of Appeal, Fifth Appellate District, No. 147 (Vandenberg Air Force Base, Santa Barbara County).

The resulting judgment would then not be grounded on a forecast of state law, but upon judicial precedent which is the complete product of the State, the enactment as phrased by the State Legislature, and as construed by the state courts. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 178 (1959). For the reasons stated, the judgment should be reversed with directions to abstain from the exercise of jurisdiction pending clarification of local law by the state courts.

CONCLUSION

For the reasons stated, the court should reaffirm that a state may constitutionally enforce its milk stabilization act against contractors with the United States under *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261, and should declare that California exercises jurisdiction over the Castle, Travis and Oakland military installations. The judgments below, therefore, should be reversed.

Respectfully submitted.

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APPENDIX

I. PROCEEDINGS IN THE DISTRICT COURT.

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants-Appellants.*	Civil No. 39030 and 39073

ORDER EXTENDING TIME FOR DOCKETING AND FILING RECORD IN THE UNITED STATES SUPREME COURT

Based on the affidavit of JOHN FOURT filed herewith and on application of counsel for defendants-appellants, and good cause appearing:

IT IS HEREBY ORDERED pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, that the time within which the appellants named above may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be, and it is hereby enlarged, to and including July 24, 1961.

Dated:

GEORGE B. HARRIS
United States District Judge

II. PERTINENT CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS.

A. Constitution of the United States, Article I, Section 8, provides in part, as follows:

"The Congress shall have power . . .

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;"

B. Federal procurement statutes: The statutes governing procurement by the federal defense agencies are found in 10 U.S.C. sections 2301-2314 which provide:

"2301. Declaration of Policy.

It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns."

"2302. Definitions.

In this chapter—

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by section 2305 of this title."

"2303. Applicability of chapter.

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds.

(1) The Department of the Army.
(2) The Department of the Navy.
(3) The Department of the Air Force.
(4) The Coast Guard.
(5) The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including—

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration."

"2304. Purchases and contracts; formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by

formal advertising. However, the head of an agency may negotiate such a purchase or contract if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) the public exigency will not permit the delay incident to advertising;

(3) the aggregate amount involved is not more than $2,500;

(4) the purchase or contract is for personal or professional services;

(5) the purchase or contract is for any service by a university, college, or other educational institution;

(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

(7) the purchase or contract is for medicine or medical supplies;

(8) the purchase or contract is for property for authorized resale;

(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

(11) the purchase or contracts is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

(12) the purchase or contract is for property or services whose procurement he determines should

not be publicly disclosed because of their character, ingredients, or components;

(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made or would unduly delay the procurement of that property; or

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the

interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

(17) negotiation of the purchase or contract is otherwise authorized by law.

(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)—(17) of subsection (a) shall be kept by the contracting agency or six years after the date of final payment on the contract.

(c) This section does not authorize—

(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

(A) it is made under clauses (1)—(3), (10)—(12, or (15) of subsection (a); or

(B) it is to be performed outside the United States; or

(2) the erection, repair, or furnishing of any public building or public improvement.

(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

(e) A report shall be made to Congress on May 19 and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of sub-

section (a) during the period since the date of the last report. The report shall—

(1) name each contractor;

(2) state the amount of each contract; and

(3) describe, with consideration of the national security, the property and services covered by each contract.

(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

(1) Sections 35—45 of title 41.

(2) Sections 276a—276a-5 of title 40.

(3) Sections 324 and 325a of title 40."

"2305. Formal advertisements for bids; times; opening; award; rejection.

(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

(b) The specification in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action."

C. The Lanham Act, 54 Stat. 1125, authorizing the purchase and improvement of land for civilian defense housing provides:

SECTION 1. In order to provide housing for persons engaged in national-defense activities, and their families, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the 'Administrator') is authorized,

"(a) To acquire prior to the approval of title by the Attorney General (without regard to sections 1136, as amended, and 3709 of the Revised Statutes) improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to section 322 of the Act of June 30, 1932 (47 Stat. 412), as amended, the Act of March 3, 1877 (19 Stat. 370), or any time limit on the availability of funds for the payment of rent), or condemnation (including

proceedings under the Acts of August 1, 1888 (25 Stat. 357), March 1, 1929 (45 Stat. 1415), and February 26, 1931 (46 Stat. 1421)).

"(b) By contract or otherwise (without regard to sections 1136, as amended, and 3709 of the Revised Statutes, section 322 of the Act of June 30, 1932 (47 Stat. 412), or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor) prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, machinery, and do all things necessary in connection therewith to carry out the purposes of this Act: *Provided*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used, but this proviso shall not be construed to prevent the use of the cost-plus-a-fixed-fee form of contract: *Provided*, That the cost per family dwelling unit shall not exceed an average of $3,000 for those units located within the continental United States nor an average of $4,000 for those located elsewhere, and the cost of no family dwelling unit shall exceed $3,950 within the continental United States or $4,750 else-

where, exclusive of expenses of administration, land acquisition, public utilities, and community facilities, and the aggregate cost of community facilities shall not exceed 3 per centum of the total cost of all projects.

"SEC. 2. As used in this Act (a) the term 'persons engaged in national-defense activities' shall include (1) enlisted men in the naval or military services of the United States; (2) employees of the United States in the Navy and War Departments assigned to duty at naval or military reservations, posts, or bases; (3) workers engaged or to be engaged in industries connected with and essential to the national defense; (b) the term 'Federal agency' means any executive department or office (including the President), independent establishment, commission, board, bureau, division, or office in the executive branch of the United States Government, or other agency of the United States, including corporations in which the United States owns all or a majority of the stock, directly or indirectly.

* * * * *

"SEC. 4. When the President shall have declared that the emergency declared by him on September 8, 1939, to exist, has ceased to exist (a) the authority contained in section 1 hereof shall terminate except with respect to contracts on projects previously entered into or undertaken and court proceedings then pending, and (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest.

* * * * * *

"SEC. 7. Notwithstanding any other provisions of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters, the Administrator, with respect to any property acquired or constructed under the provisions of this Act, is authorized by means of Government personnel, selected qualified private agencies, or public agencies (a) to deal with, maintain, operate, administer, and insure; (b) to pursue to final collection by way of compromise or otherwise, all claims arising therefrom; (c) to rent, lease, exchange, sell for cash or credit, and convey the whole or any part of such property and to convey without cost portions thereof to local municipalities for street or other public use: *Provided*, That any such transaction shall be upon such terms, including the period of any lease, as may be deemed by the Administrator to be in the public interest: *Provided further*, That the Administrator shall fix fair rentals, on projects developed pursuant to this Act, which shall be within the financial reach of persons engaged in national defense: *Provided further*, That any lease authorized hereunder shall not be subject to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

"SEC. 8. In carrying out the provisions of this Act the Administrator is authorized to utilize and act through the Federal Works Agency and other Federal agencies and any local public agency, with the consent of such agency, and any funds appropriated pursuant to this Act shall be available for transfer to any such agency in reimbursement therefor. Nothing in this Act shall be construed to prevent the Administrator from employing or utilizing the professional services of private persons, firms, or corporations.

"SEC. 9. The Administrator may enter into any agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation.

"SEC. 10. Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property.

"SEC. 11. The Administrator is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act, and shall establish reasonable standards of safety, convenience, and health."

* * * * * *

D. The Joint Resolution of Congress of September 11, 1841, 5 Stat. 468, provided:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the Attorney General of the United States to examine into the titles of all the lands or sites which have been purchased by the United States, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom-houses, light-houses, or other public buildings of any kind whatever, and report his opinion as to the validity of the title in each case to the President of the United States.

"2. *Resolved*, That it shall be the duty of all the officers of the United States having any of the title-papers to the property aforesaid in their possession, to furnish them forthwith to the Attorney General, to aid him in the investigation aforesaid.

"3. *Resolved*, That no public money shall be expended upon any site or land hereafter to be purchased by the United States for the purposes aforesaid, until the written opinion of the Attorney General shall be had in favor of the validity of the title, and also the consent of the Legislature of the State in which the land or site may be shall be given to said purchaser.

"4. *Resolved*, That it shall be the duty of the District Attorneys of the United States, upon the application of the Attorney General, to furnish any assistance or information in their power in relation to the titles of the public property aforesaid lying within their respective districts.

"5. *Resolved*, That it shall be the duty of the Secretaries of the Executive Departments, upon the application of the Attorney General, to procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of Government; the expense of procuring which to be paid out of the appropriations made for the contingencies of the Departments respectively.

"6. *Resolved*, That it shall be the duty of the Secretaries of the Executive Departments, respectively, under whose direction any lands for the purposes aforesaid may have been purchased, and over which the United States do not possess jurisdiction, to apply to the Legislatures of the States in which the lands are situated, for a cession of jurisdiction, and in case of

refusal, to report the same to Congress at the commencement of the next session thereafter."

Revised Statutes, Section 355, as enacted 1875:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necesary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

Revised Statutes, Section 355, as amended by the Act of October 9, 1940, 54 Stat. 1083, provides:

"SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.

"'Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: *Provided*, That the total value of any lands or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except roads, trails, and fire-protection improvements) on any site, tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this Act, values of lands and interests in land shall be determined by the consideration paid or to be paid.

"'The Attorney General is hereby authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

"'Nothing in this Act shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this Act be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

"'The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

"'The Attorney General may, in his discretion, base any opinion as to title required either by this Act or any other law upon either or both of the following: Certificates of title of title companies or such evidence of title as he may deem satisfactory.

"'The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of War, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on the date this section as amended takes ef-

fect with respect to the approval by them of title to land or interests in land acquired by the War Department or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law, be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for the acquisition or improvement of easements and rights-of-way by the Department of Agriculture for forest and other conservation purposes where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500; and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

"'Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the

Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.'"

III. PERTINENT CALIFORNIA STATUTORY PROVISIONS AND LEGISLATIVE HISTORY.

A. The California milk stabilization act derived from California Statutes of 1935, Chapter 241, page 922, as amended, is now set forth in California Agricultural Code, Division 6, Chapter 17. Relevant provisions state:

"4200. The production and distribution of fluid milk and of fluid cream and the dissemination of accurate, scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State.

4201. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing,

sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity; however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

4202. It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary, and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

4203. The foregoing statements in this article of facts, policy and application of this chapter are hereby declared a matter of legislative determination.

4204. The purposes of this chapter are:

* * * * *

(b) To authorize and enable the director to prescribe marketing areas and to determine prices to pro-

ducers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State; provided, that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

(d) To enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about and maintain a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

4205. It is the intent of the Legislature that the powers conferred in this chapter shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices.

Article 2. Definitions

4210. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

* * * * * *

4212. "Fluid milk" means any and all whole or concentrated milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed.

4213. "Fluid cream" means cream as defined in this code, and any combination of cream and milk, or any fluid product of milk or cream sold under any trade name whatsoever, which is not packaged in hermetically sealed containers and which contains more than 14.6 percent milk fat and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4214. "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

4215. "Producer" means any person who produces fluid milk from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold, and whose fluid milk or fluid cream is received or handled by any distributor. "Producer" includes any association of producers.

4216. "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributor" shall not include any of the following: (1) Any retail store that is actively and directly not en-

gaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not actively and directly engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor, (5) any person as to any transaction where such person purchases processed and packaged fluid milk or fluid cream, but does not thereafter physically handle such fluid milk or fluid cream for sale. The term "physically handle" as used in this subdivision shall mean: (a) to refrigerate or store or assemble individual order allotments at a fixed, established business location prior to transportation on regularly operated routes for sales of fluid milk or fluid cream on such routes to wholesale customers or directly to consumers at their homes or places of work; or (b) to transport in a mobile vehicle or unit regularly operated on routes predominately for sales of fluid milk or fluid cream on such routes to wholesale customers or directly to consumers at their homes or places of work.

4218. "Retail store" means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

4219. "Marketing area" is any area within this State declared to be such in the manner prescribed in this chapter.

4220. "Stabilization and marketing plan" means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things, the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

4221. "Consumer" means any person who purchases fluid milk, fluid cream or dairy products for consumption.

4222. "Person" means any individual, firm, corporation, association or any other business unit.

4223. "Fluid skim milk" means skim milk as defined in this code that is derived from market milk and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4225. Fluid milk may be classified for the purposes of this chapter as provided in this article.

4226. Class 1 comprises any fluid milk, fluid skim milk, or fluid cream that is supplied to consumers as market milk, market skim milk, or market cream or concentrated milk or any combination of market milk, market skim milk, and market cream, or any market milk which is not sterilized and packaged in hermetically sealed containers, or any other dairy product in which the use of market milk or any components or derivatives of market milk is required by or pursuant to the provisions of this code, or any fluid milk, fluid skim milk, fluid cream, milk-fat, or milk solids not fat used in the standardizing or fortifying of market milk or any dairy product defined herein as Class 1.

4227. Class 2 comprises any fluid milk, fluid skim milk or fluid cream which is used in the manufacture of any product for which a definition and standard is

prescribed in Division 4 of this code, except any such product which is included in Classes 1 and 3.

4228. Class 3 comprises all fluid milk, fluid skim milk, or fluid cream, which is used in the manufacture of butter, cheese other than cottage cheese, dried milk, dried skim milk, nonfat dry milk solids, defatted milk solids, dried buttermilk, or any product for which no definition and standards are prescribed in Division 4 of this code; . . .

4230. In designating and prescribing or providing methods for designating and prescribing minimum prices to be paid by distributors to producers for Classes 2 or 3 fluid milk, fluid skim milk or fluid cream, the director may take into consideration all relevant economic factors, including but not limited to the relative market values of the various products involved and the market price of other milk which may be used for the same purposes set forth in such respective classes. In no event shall any distributor pay producers or any association of producers less than the applicable price established for the usage to which the fluid milk, fluid skim milk or fluid cream purchased from them is applied; and no payment shall be made by distributors to producers or any association of producers of prices lower than those established in the applicable stabilization and marketing plan for Class 3 usage.

Article 4. General Powers of the Director

4240. The director shall enforce the provisions of this chapter and any stabilization and marketing plan initiated pursuant to the provisions of this chapter. The director is authorized and directed to adopt and promulgate rules and regulations for the proper administration and enforcement of the provisions of

this chapter. Any such rules or regulations or amendment thereof shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4, (commencing with Section 11370) of Part 1 of Division 3 of Title 2 of the Government Code.

4242. The director is hereby declared to be the instrumentality of this State for the purpose of administering and enforcing the provisions of this chapter and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority described in this chapter.

* * * * * *

4244. The director may issue licenses to distributors and require the registration of producers.

4245. The director may formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan.

4246. The director may prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors, pursuant to the provisions of this chapter.

4247. In the event that the director establishes under this chapter a stabilization and marketing plan for fluid milk, the director shall prescribe minimum prices to be paid by distributors for fluid cream, fluid skim milk, or milk fat, or fluid skim-milk components of such fluid milk, under such a stabilization and marketing plan, pursuant to the provisions of this chapter.

* * * * * *

4254. A full and accurate record of business or acts performed or of testimony taken by the director in pursuance of the provisions of this chapter shall be kept and placed on file in the office of the director.

4255. Any order of the director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

4256. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence, or place of business, may be in several counties and the violations separate and distinct. Any proceeding brought hereunder shall be governed in all other respects by the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

4257. The director may confer, enter into agreements, or otherwise arrange with the constituted authorities of this State, other states, or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this State or as between this State and other states or the United States, and may exercise his powers hereunder to effectuate and enforce such plans.

Article 5. Formation and Adoption of Stabilization and Marketing Plans

4270. The director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream and fluid skim milk are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter. When the director finds, after a public hearing in and for each particular marketing area under consideration for consolidation, that conditions of production and distribution are reasonably uniform in two or more such marketing areas wherein stabilization and marketing plans and minimum wholesale and minimum retail prices are in effect, he may consolidate the areas: provided, that at said hearings more than thirty-five (35) percent of the producers present who supply the areas proposed to be consolidated do not object to such consolidation.

4271. The director shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the

fluid milk produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for said area; but if a petition is presented to the director by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

Article 6. Mandatory Provisions

4280. Each stabilization and marketing plan shall contain provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

(a) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream or fluid skim milk business of any customer.

(c) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream or fluid skim milk of like quantity under like terms and conditions.

(d) The false or misleading advertising of fluid milk or fluid cream or fluid skim milk as defined in

Sections 17500, 17501, and 17502 of the Business and Professions Code.

(e) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers. Such contract shall include the following: (1) the amount of fluid milk to be purchased for any period; (2) the quantity of such milk to be paid for as Class 1. Such quantity shall be stated in pounds of milk or pounds of milk fat or gallons of milk; provided, that if the price to be paid for such Class 1 milk is established separately for the milk fat and skim milk contained in such milk, such quantity to be paid for as Class 1 shall be stated in pounds of milk or pounds of milk fat or gallons of milk or both in pounds of milk fat and pounds of skim milk separately, but in any marketing area where an equalization pool is a part of a stabilization and marketing plan, such contract need not specify the quantity of milk in any one class; (3) the price to be paid for all milk received; (4) the date and method of payment for such fluid milk, which shall be that payment shall be made for approximately one-half of the milk delivered in any calendar month not later than the first day of the next following month and the remainder not later than the fifteenth day of said month; (5) the charges for transportation if hauled by the distributor; and (6) a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at or less than the minimum price for fluid milk that is used for Class 3, as said class is defined in Section 4228. The contract may contain such other provisions as are not in conflict with this chapter. A signed copy of such contract shall be filed by

the distributor with the director within five days from the date of its execution. The provisions of this subdivision relating to dates of payment shall not apply to contracts for the purchase of fluid milk from nonprofit cooperative associations of producers. The provisions of this subdivision do not apply to the purchase of fluid milk which is necessary to meet an unanticipated increase in demand or an unanticipated shortage in the supply of a distributor; provided, that the quantity of fluid milk so purchased from any one producer or association of producers shall not exceed 1,000 gallons in any one month; and, provided further, that a complete record of all such purchases shall be kept by the distributor and the price paid for such milk by the distributor shall not be less than the price established in the applicable stabilization and marketing plan for the usage to which such milk is applied.

(f) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream or fluid skim milk which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(g) The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of any marketing area for

less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. The provisions of this section with respect to fluid milk shall apply whether or not such fluid milk is received by the distributor as whole milk, or as skim milk and fluid cream, or either, or as any other derivatives of such fluid milk which are reconstituted into such fluid milk, or fluid cream or fluid skim milk for market usage, and whether or not a fluid cream plan has been established for the marketing area.

4280.1. Each such plan shall contain provisions for prohibiting producers and distributors from engaging in the unfair practices hereinafter set forth:

(a) The payment or gift or the offer or promise of any payment or gift of money or other thing of value, directly or indirectly or through any agent or other intermediary, to any person with the purpose or design of inducing such person to become a wholesale customer of any distributor.

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4283. Each such plan shall contain provisions whereby the director shall provide methods for the establishment of minimum prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, received within a marketing area regardless of whether such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed within or without such marketing area within the jurisdiction of the State of California, and may contain such provisions whether or not such fluid milk, fluid cream, or the milk

fat or fluid skim milk components of such fluid milk or fluid skim milk is subsequently sold or distributed without the jurisdiction of the State of California. Such stabilization and marketing plans shall provide for the establishment of prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, whether or not such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect. The stabilization and marketing plan shall provide that producers shall be paid not less than the minimum prices established for the marketing area wherein such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is ultimately sold or distributed, and shall further provide that in the event such fluid milk, fluid cream, of the milk fat or fluid skim milk components of such fluid milk, fluid skim milk, is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, shall be paid by the distributor to the producer thereof at not less than the average of prices paid by distributors, whose plants are located within such area, to producers for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk, but in the event no plants are located within said area, then the price which shall be paid by the distributor to the producer thereof shall not be less than the average of prices paid by distributors to producers for fluid milk, fluid

cream, or fluid skim milk, or the milk fat or fluid skim milk components of such fluid milk, at the plants in the nearest marketing areas adjacent to the area where such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is sold or distributed as established by the Stabilization and marketing plans in effect in such adjacent marketing areas.

Article 10. Minimum Wholesale and Retail Prices

4350. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale and minimum retail prices for fluid milk, or fluid cream, or both, as hereinafter set forth, and to enforce the provisions of this article.

4351. In all marketing areas wherein a stabilization and marketing plan for fluid milk is in effect or is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, minimum wholesale and minimum retail prices for fluid milk, including pasteurized concentrated milk, and low fat milk pursuant to the provisions of this article. In all marketing areas wherein the director has, under a stabilization and marketing plan for fluid milk, prescribed minimum prices to be paid by the distributors for fluid cream, or fluid skim milk, or either or both, the director may designate and prescribe, or provide methods for designating and prescribing minimum wholesale and minimum retail prices for fluid cream, or fluid skim milk, or either or both, pursuant to the provisions of this article. The term "fluid milk" as used in this chapter shall, unless

the context otherwise requires or indicates, mean and include (1) the term "fluid skim milk" in the application of this chapter to any marketing area in which the director has exercised his discretion to designate and prescribe, or provide methods for designating the prescribing, minimum wholesale and minimum retail prices for fluid skim milk, and (2) the term "low fat milk."

4352. Minimum wholesale prices, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor. Minimum wholesale prices, as used herein, includes prices at which fluid milk or fluid cream, or both, shall be sold by distributors to other distributors, other than in bulk, which prices may vary from the minimum prices established for sales by distributors to other wholesale customers and which prices shall be known as "subdistributor prices." A subdistributor price shall be established for each marketing area and when fluid milk or fluid cream, or both, is purchased, other than in bulk, by one distributor from another distributor for sale in a marketing area other than the marketing area where purchased the price paid shall not be less than the minimum subdistributor price for the marketing area in which the fluid milk or fluid cream, or both, is ultimately sold.

4353. Minimum retail prices, as used herein, shall mean minimum prices at which fluid milk or fluid

cream, or both, shall be sold by distributors and retail stores to consumers.

4355. In determining minimum wholesale and minimum retail prices for fluid milk or fluid cream, or both, for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area in addition to other matters required by this chapter to be taken into consideration by him:

(a) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(b) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(c) The estimated purchasing power of consumers in such marketing area.

(d) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

(e) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by distributors, including all costs of hauling, processing, selling and delivering and reasonable return on necessary capital investment, for each of the several methods of distribution used in such marketing area in accomplishing such hauling, processing, selling and delivery, excluding costs which are not reasonably necessary to efficient operation, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of all, or such portion of the distributors in such marketing area as are reasonably

determined by the director to be sufficiently representative to indicate the reasonably necessary costs of sufficient, efficient distribution for such marketing area.

(f) The estimated amount of the available capacity for processing and distributing fluid milk or fluid cream, or both, of distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

(g) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by retail stores, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of such portion of the retail stores in such marketing areas as are reasonably determined by the director to be sufficiently representative to indicate such costs of all retail stores in such marketing area. In determining such costs incurred by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

4355.5. In determining minimum wholesale and minimum retail prices for any marketing area, the prices paid by distributors to producers as established pursuant to this chapter shall also be considered as the cost of fluid milk, fluid skim milk, or fluid cream to any association of producers, or other cooperative

association, incorporated or unincorporated, engaged in the distributions of fluid milk, fluid skim milk, or fluid cream.

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4360. Following such hearings, investigation, surveys or examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area for distributors therein, and minimum retail prices for retail stores therein, which minimum wholesale and minimum retail prices shall be sufficient, but not more than reasonably sufficient, to cover costs, as such costs are described in Section 4355 of this code, according to method of distribution, and reasonable return upon necessary capital investment, and shown to the director by the facts available to the director from the hearings, investigation, surveys or examinations for such marketing area required in this chapter, and the director shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective; provided, however, that whenever the director shall determine from credible evidence that any prices established as hereinabove set forth will not or would not conform to and effectuate the legislative declarations, purposes and intent set forth in this chapter, then he shall instead establish minimum wholesale or minimum retail prices which are higher or lower than those sufficient to cover said costs and reasonable return on capital investment, upon the condition that he shall determine in his judgment and shall find in writing with respect to such higher or lower minimum prices:

(a) That such minimum prices will tend to maintain in the business of distributing fluid milk and fluid

cream, or both, such reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds necessary to insure to consumers in such marketing area sufficient distribution facilities to supply the quantity of fluid milk or fluid cream, or both, required by such consumers without requiring such consumers to pay more for their supplies of such fluid milk, or fluid cream, or both, than is necessary to maintain adequate and efficient distribution facilities in such marketing area.

(b) That such minimum prices will not tend to induce or authorize the development of unfair trade practices, unfair competition, conditions of monopoly or combinations in restraint of trade, and that such minimum prices will tend to encourage the orderly and efficient marketing of fluid milk or fluid cream, or both.

4361. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article. The use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, or any retail store, restaurant, confectionery, or other place for consumption on or off the premises, buys or offers or agrees to buy from

any distributor, or sells or offers or agrees to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, is prohibited whether such method, device or transaction applies directly to fluid milk, fluid cream or either or applies to or is used in connection with the sale or handling of any commodity, product or article. Prohibited methods, devices or transactions shall include, but not be limited to, any one or more of the following: discounts, rebates, free services, advertising allowances, leases of refrigeration or other equipment, gifts, or payments, allowances or credits made or given for, or in connection with, the return of containers or other property, unless such payment, allowance or credit is a repayment of a deposit or charge, in excess of the price established by the director under the provisions of this article, paid by a wholesale customer, or by a consumer, for the return of such containers or other property.

A distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises shall be considered to have violated the provisions of this section if it engages in such violation directly or through an agent, employee, or subsidiary or affiliated company or corporation. For purposes of this section subsidiary or affiliated company or corporation includes, but is not limited to, companies or corporations controlled by the distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises, directly or indirectly through ownership of issued capital stock or otherwise.

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Article 11. Distributors' Licenses, Fees and Bonds

4375. No distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director, shall be accompanied by an application fee of three dollars ($3), and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for renewal of a license for the following year by a licensee, together with the application fee of three dollars ($3), shall be made prior to the expiration date of the license held, and if not so made the applicant shall pay an additional sum equal to 100 percent of the application fee before such license shall be issued.

Article 14. Penalties

4410. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provi-

sions of this chapter, or of any of the unfair practices set forth in this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4361.5, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of this chapter or of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream or any rule or regulation duly adopted and promulgated by the director under Section 4240 shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

Article 15. Disciplinary Proceedings.

4415. The director may refuse to grant any license herein provided and may revoke or suspend any such license as the case may require when he is satisfied

that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or any rule or regulation duly adopted and promulgated by the director under Section 4240. The proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all the powers granted therein. The decision may include an order refusing, revoking or suspending the license applied for, or held by the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4240.

After any decision including any conditional or probationary orders, should respondent fail, refuse or neglect to comply with any such orders, the director may suspend or revoke the license in accordance with the procedure provided in this section.

Previous violation by any applicant, or by any person connected with said applicant, of any provision of this chapter, or of any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director

establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream, formulated under the provisions of this chapter, or any rule or regulation, duly adopted and promulgated by the director under Section 1240, shall be good and sufficient ground for denial, revocation or suspension of a license.

1116. Whenever the director is satisfied, either by investigation or after hearing, that a distributor is 'unable to pay' for fluid milk and or fluid cream purchased from producers, and is further satisfied that to permit the distributor to continue to purchase and receive fluid milk and or fluid cream from producers would be likely to cause serious and irreparable loss to producer-creditors and other producers, then the director within his discretion may thereupon and forthwith shorten the time for hearing that is provided for in Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and thereupon may issue an order to show cause why the license of said distributor should not be forthwith suspended or revoked: provided, however, that the time of notice of said hearing shall in no event be less than five days. At such hearing the distributor proceeded against shall be ordered to show cause why his or its license should not be suspended or revoked or continued under such conditions and provisions, if any, as the director may consider just and proper and for the protection of the best interests of the producer-creditors and producers from whom the distributor has been and is receiving fluid milk and or fluid cream. Following such hearing, the decision of the director shall become effective at his discretion.

Said hearing, in the case of such emergency, may be called upon written notice, said notice to be served

personally or by mail on the distributor involved and may be held at the nearest office of the director or at such place as may be most convenient in the discretion of the director for the attendance of all parties involved.

Article 16. Construction and Interpretation

4420. (a) The Legislature hereby declares that Chapter 17 of Division 6 of this code is intended to formulate a comprehensive scheme for the regulation of marketing and distribution of fluid milk and fluid cream. If, however, any provision of, or addition or amendment to, said Chapter 17 of Division 6 of this code, either as originally enacted in 1935 at the Fifty-first Regular Session of the California Legislature, or as amended or added to or recodified or reenacted at any subsequent session of the California Legislature, should be held to be unconstitutional, the unconstitutionality of such provision shall not affect any other provision of said chapter.

(b) If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

B. The California statutes granting state consent to the federal purchase of land for military purposes are:

Section 34, Political Code, enacted 1872:

"The legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the Courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

Section 34, Political Code, as amended by Statutes of 1939, Chapter 710, page 2231:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in

the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract or land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States."

Government Code, Section 111, Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

Government Code, Section 126; Statutes First Extra Session 1946, Chapter 154, page 199:

"Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the pur-

view of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Board of Equalization, and the board must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each State agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land, all civil and poltical rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Board of Equalization provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Board of Equalization shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 377 to 380, inclusive, of the Fish and Game Code."

Government Code, Section 126 Statutes 1961, Chapter 966, page 2606:

"Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved

March 1, 1911, (36 Stat. 961) known as the "Weeks Act";

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must in writing have requested state consent to acquire such land and subject to each and all of the conditions and reservations in this section and in Section 4 of Article XIV of the Constitution prescribed;

(d) The conditions and reservations prescribed in subdivisions (a), (b), (c), (e), and (h) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the Office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State grant concurrent jurisdiction on and over the land to the United States, excepting and reserving state jurisdiction on and over the land for the execution of civil and criminal process and to enforce the laws of the State of California in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

(g) Acquisition as used in this section means: (1) lands acquired in fee by purchase or condemnation, (2) lands owned by the United States that are included in the military reservation by presidential proclamation or act of Congress, and (3) leaseholds acquired by the United States over private lands or state-owned lands."

(h) In granting this consent, the Legislature and the State reserve jurisdiction over the land, water and use of water with full power to control and regulate the acquisition, use, control and distribution of water with respect to the land acquired.

(i) In granting this consent, the Legislature and the State except and reserve to the State all deposits of minerals, including oil and gas, in the land, and to the State, or persons authorized by the State, the right to prospect for, mine, and remove such deposits from the land.

The finding and declaration of the State Lands Commission provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published pursuant to Section 6061 in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice and all other expenses incurred by the commission shall be borne by the United States.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 10680 to 10685, inclusive, of the Fish and Game Code.

SEC. 2. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The extent to which jurisdiction of the State of California applies within federal lands in this State is a matter of the utmost importance in numerous transactions every day. It is imperative that this bill, which, in effect, requires that the will of the people of this State prevail in all territory within the boundaries of this State, to the extent not inconsistent with federal duties, go into effect as early as possible. Thereby, those laws which the people, through their representatives, have enacted for the public peace, health, and safety will have greater applicability."

C. The California statutes tendering cession of jurisdiction to the United States over land conveyed or ceded to the government for military purposes are:

Statutes of 1897, Chapter 56, page 51:

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in

which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

SEC. 2. This Act shall take effect immediately."

Government Code, Section 114, Statutes of 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes, reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated."

D. The California statutes reserving state criminal jurisdiction over officers committed on lands whose jurisdiction is ceded to the United States are:

Statutes of 1891, Chapter 181, page 262:

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.

SEC. 2. This Act shall take effect immediately."

Government Code, Section 113, Statutes 1943, Chapter 134, page 898:

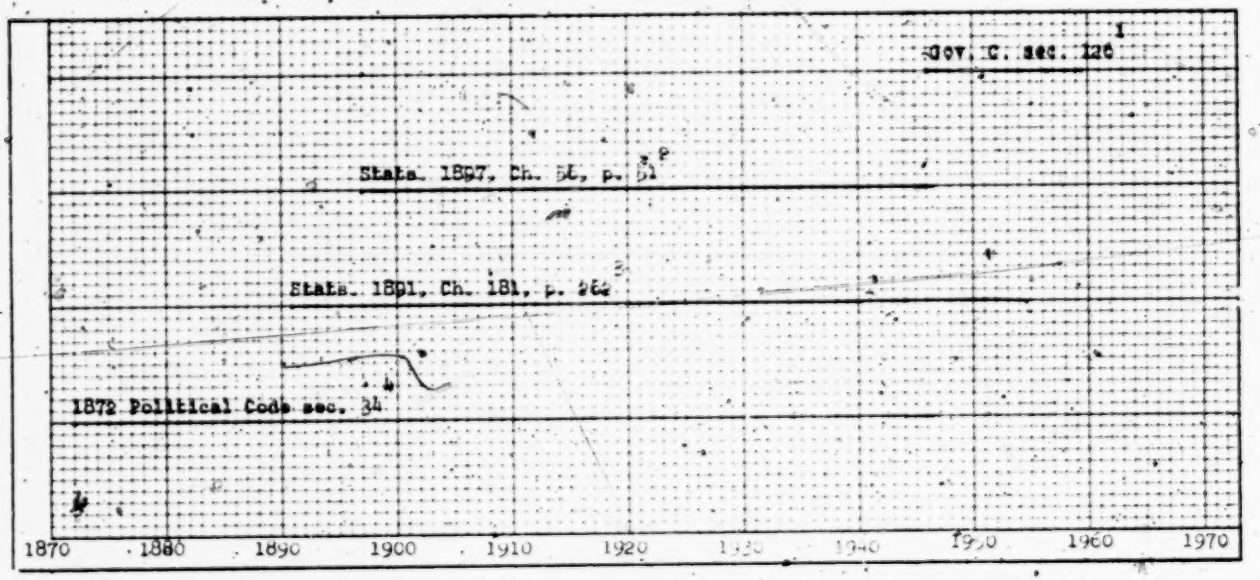
"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation."

Government Code; Section 113, as amended Statutes of 1947, Chapter 1532, page 3164:

"SEC. 2. Section 113 of said code is amended to read:

113. The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

E. Graph showing legislative history of the California consent to purchase and cession of jurisdiction statutes.



FOOTNOTES

[1] Gov. C. sec. 126, eff. May 21, 1946 by Stats. 1st Ex. Sess., 1946, Ch. 154, p. 190. Now in effect as amended eff. July 6, 1961 by Stats. 1961, Ch. 966, p. 2986.

[2] Stats. 1897, Ch. 56, p. 51, eff. March 2, 1897, codified into Gov. C. sec. 114, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 19, 1947 by Stats. 1947, Ch. 1532, p. 3163.

[3] Stats. 1891, Ch. 181, p. 262, eff. March 31, 1891, codified into Gov. C. sec. 113 eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 7, 1955 by Stats. 1955, Ch. 1447, p. 2636.

[4] 1872 Pol. C. sec. 34, eff. March 12, 1872, codified into Gov. C. sec. 111, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 1009, until repealed eff. Sept. 19, 1947 by Stats. 1947, Ch. 1532, p. 3163.

F. California Senate Bills 656, enacted as Government Code, Sections 113 and 126, Statutes of 1947, Chapter 1532, page 3163, as introduced January 29, 1947, and as amended in the State Senate May 16, 1947, read:

SENATE BILL No. 656

January 29, 1947

An act to amend Section 126 of the Government Code, relating to the acquisition of land in this State by the United States.

The people of the State of California do enact as follows:

SECTION 1. Section 126 of the Government Code is amended to read:

126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State ~~Board of Equalization~~ *Lands Commission*, and the ~~board~~ *commission* must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State ~~Board of Equalization~~ *Lands Commission* provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State ~~Board of Equalization~~

Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

AMENDED IN SENATE MAY 16, 1947

SENATE BILL No. 656

~~*An act to amend Section 126 of the Government Code, relating*~~ AN ACT TO AMEND SECTIONS 126 AND 113, AND TO REPEAL SECTIONS 111, 112, 114, 116 AND 117 OF THE GOVERNMENT CODE, AND TO REPEAL CHAPTER 3, STATUTES 1934 (1ST EX.) SESSION, RELATING *to the acquisition of land in this State by the United States.*

The people of the State of California do enact as follows:

SECTION 1. Section 126 of the Government Code is amended to read:

126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, *or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911, (36 Stat. 961) known as the "Weeks Act";*

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States ~~must have acquired title to the land and~~ must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and ~~reserves~~ *reserve* to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Lands Commission provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land

or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

SEC. 2. Section 113 of said code is amended to read:

113. The State ~~cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving~~ *reserves* the administration of the criminal law of the State ~~, the authority to serve and execute process and the State's entire power of taxation~~ *with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof.*

SEC. 3. Sections 111, 112, 114, 116, and 117 of said code are repealed.

SEC. 4. Chapter 3 of the Statutes of 1934 (First Extraordinary) Session is repealed.

IV. PUBLICATIONS AND LETTERS, UNITED STATES DEPARTMENTS OF AGRICULTURE, AND DEFENSE.

United States Department of Agriculture bulletin 2179-61, dated July 12, 1961:

UNITED STATES DEPARTMENT OF AGRICULTURE

Washington, July 12, 1961

Program Increases 1960 Military and Veterans Milk Use by 543 Million Pints:

The U.S. Department of Agriculture today announced that U.S. Armed Forces and veterans hospital patients increased consumption of milk over the standard ration by about 543 million pints in 1960 under a special USDA program to stimulate expanded use of milk for troop feeding.

Under this program USDA pays a part of the cost of additional milk consumed.

Total consumption of fluid-milk by personnel in the Army, Navy, Air Force, Marines, Coast Guard, U.S. Merchant Marine Academy, and veterans hospitals was more than double what it would have been if only standard ration purchases of fluid milk had been made.

Secretary of Agriculture Orville L. Freeman said, "This is a highly beneficial use of our agricultural abundance. It is made possible by the efficient production of American farmers and by programs which enable them to protect the public against scarcity.

"As a direct result of this program, men and women in the U.S. Armed Forces, the U.S. Merchant Marine and veterans hospitals are getting considerably larger rations of nutritious and healthful milk. Price-support purchases are reduced as more of our yearly milk production is consumed in fluid form to the benefit of the military personnel and the entire Nation."

Under an agreement between the Commodity Credit Corporation and the Army Quartermaster Corps, acting for all military agencies, the Coast Guard, and the U.S. Merchant Marine Academy, and another agreement between CCC and the Veteran's Administration, part of the cost of the increase is being paid from CCC funds.

The part paid by CCC through 1960 was $4.10 per hundred pounds of milk. The increase in milk consumption diverts fluid milk from the manufacture of dairy products that otherwise would be purchased by CCC under price support.

Payments to the cooperating agencies for the 1960 increase in consumption totaled $23,911,074. This is the approximate cost that CCC would have incurred in purchasing, handling, and storing butter and nonfat dry milk produced from an amount of milk equal to the increase of 583,197,726 pounds in consumption, or the equivalent of about 543 million pints of milk.

Milk consumption under this special program has been increased 2,858,135,883 pounds or about 2,659,000,000 pints since the beginning of the program in November 1954. Payments by CCC amount to $117,184,305. Additional details are given on the other side of this release concerning the milk consumption increases.

Also shown on the other side are the quantities of dairy products that have been transferred to these agencies during the period May 1953 through December 1960 to increase their consumption over and above normal consumption of these dairy products.

The programs are carried out under legislation authorizing purchases of fluid milk in carrying out mandatory price-support operations, and also provid-

ing that CCC stocks of dairy products may be transferred for increased use by Armed Forces and other agencies.

The following table shows the fluid milk consumption increases by personnel in the Armed Forces, veterans hospitals, Coast Guard and Merchant Marine Academy since 1954 when the special program began, through 1960.

Period	*Pounds*	*Dollars*
1954	17,380,701	712,608
1955	182,463,301	7,480,761
1956	344,149,844	14,110,121
1957	601,289,972	24,652,888
1958	565,616,012	23,191,255
1959:		
January-March	140,901,126	5,776,946
April-June	137,332,333	5,630,627
July-September	144,261,183	5,914,709
October-December	141,544,285	5,803,316
Total	564,038,927	23,125,598
1960:		
January-March	140,924,706	5,777,881
April-June	143,882,496	5,899,182
July-September	151,825,945	6,224,864
October-December	146,564,579 [1]	6,009,147 [1]
Total	583,197,726 [1]	23,911,074 [1]
November 1954 to December 1960	2,858,135,883	117,184,305

[1] Preliminary.

Shown below are the quantities of dairy products transferred to these agencies for use in addition to their normal consumption from May 1953 through 1960.

	Butter	Cheese. (Thousand pounds)	Nonfat dry milk
1953	15,034 [2]		
1954	26,949 [2]	502	63
1955	36,612	1,697	142
1956	25,241	1,752	122
1957	22,811	2,016	36
1958	24,974	2,435	38
1959	24,641	2,708	72
1960	15,947	496	76
1953-60 Total	192,209	11,606	549

[2] Includes 34,936,000 pounds sold at reduced prices in 1953 and 1954 for ... creased use.

Letters dated April 16, 1943 (R. 374) and January 3, 1944 (R. 339), from United States Secretary of War to Governor of California:

WAR DEPARTMENT

WASHINGTON, January 3, 1944

HONORABLE EARL WARREN
Governor of California
Sacramento, California

DEAR GOVERNOR WARREN:

The laws of the State of California (Section 33 of the Political Code of California, and section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, chap. 710, p. 2231), permit the assumption of exclusive Federal jurisdiction over lands within that State acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255),

it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

Information is being assembled to assist you in complying with an act of the legislature of California approved May 17, 1943 (Cal. Stats. 1943, chap. 536), and will be forwarded under separate cover.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

(signed) HENRY L. STIMSON
Secretary of War

Original of this letter received January 8, 1944

(signed) EARL WARREN
Governor of California

OSW 680.2
California
(4 16 43)

HONORABLE EARL WARREN
Governor of California
Sacramento, California

DEAR GOVERNOR WARREN:

The laws of the State of California, (Section 33 of the Political Code of California, and section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, chap. 710, p. 2231), permit the assumption of exclusive Federal jurisdiction over lands within that State, acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

It is requested that you return the inclosed copy of this letter, with an indorsement thereon over your signature stating the date of your receipt of this notice.

Sincerely yours,

HENRY L. STIMSON
Secretary of War

The original of this letter of acceptance was received in the Office of the Governor on the 21st day of April, 1943.

EARL WARREN
Governor of the State of California

V. CONSENT TO PURCHASE AND CESSION OF JURISDICTION, STATUTES OF STATES OTHER THAN CALIFORNIA.

Section 3, Chapter 1, Article I. 1931 Code of West Virginia, provided:

"*Acquisition of Lands by United States; Jurisdiction.* The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever, or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases.

"Any county, magisterial district or municipality, whether incorporated under general law or special act of the legislature, shall have power to pay for any such tract or parcel of land and present the same to the government of the United States free of cost, for any of the purposes aforesaid, and to issue bonds and levy taxes for the purpose of paying for the same; and, in the case of a municipal corporation, the land so purchased and presented may be within the corporate limits of such municipality or within five miles thereof: Provided, however, That no such county, magisterial

district or municipality shall, by the issue and sale of such bonds, cause the aggregate of its debt to exceed the limit fixed by the Constitution of this State: Provided further, That the provisions of the Constitution and statutes of this State, or of the special act creating any municipality, relating to submitting the question of the issuing of bonds and all questions connected with the same to a vote of the people, shall, in all respects, be observed and complied with.

"Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall reinvest in this State. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. Jurisdiction heretofore ceded to the United States over any land within this State by any previous acts of the legislature shall continue according to the terms of the respective cessions."

Section 4, Chapter XX, page 265, 1881 Acts of West Virginia, provided:

"4. In pursuance of the seventeenth clause of the eighth section of the first article of the constitution of the United States, the consent of the legislature of West Virginia is hereby given to the purchase or condemnation, whether heretofore or hereafter made or had by the government of the United States, or

under its authority, of any tract or parcel of land within the limits of the state, for the purpose of erecting thereon lighthouses, beacons, signal stations, post offices, custom houses, court houses, locks, dams, and works for the improvement of the navigation of any water course, and other needful buildings or structures. The evidences of title to such land shall be recorded as in other cases. But the quantity of land to be so acquired shall not exceed twenty-five acres in any one place."

1927 Acts of Arkansas, Act 108, page 302, provided:

SECTION 1. That Section 4566 of Crawford & Moses' Digest is hereby amended to read as follows:

"That the consent of the State of Arkansas be and is hereby given to the acquisition by the United States, by purchase, or otherwise with adequate compensation, of such land in Arkansas as in the opinion of the Federal Government may be needed for the establishment, consolidation and extension of National Forests in the State, for the purpose of the Act of Congress entitled "An Act to Enable any State to cooperate with any other State or States, or with the United States, for the protection of the Watersheds of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers," approved March 1st, 1911, (36 Statute, 961), and acts supplementary thereto and amendatory thereof; provided, that this Section applies only in those counties where the United States now owns land comprising National Forests and in Counties adjoining the aforesaid Counties; further provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil

process in all cases, and such criminal process as may be issue under the authority of the State of Arkansas against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this Act had not been passed."

SECTION 2. That Section 4567 of Crawford & Moses' Digest is hereby amended to read as follows:

"Power is hereby conferred upon the Congress of the United States to pass laws and to make or provide for the making of such rules and regulations of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as have been acquired or may hereafter be acquired under the provisions of this Act."

Cooper's Statutes of South Carolina, 1795, Vol. V, p. 259, provided:

"WHEREAS, the late Secretary of State of the United States, in his letter to the late Governor of this State, did request that he would take proper measures for obtaining the consent of the Legislature of this State, that the United States should purchase a quantity of land in this State, whereon arsenals and magazines might be erected:

I. *Be it therefore enacted* by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the United States, or such person or persons as may be by them authorized, shall have a right to purchase, in any part of this State that may be thought most

eligible, the fee simple of any quantity of land, not exceeding two thousand acres, for the purpose of erecting arsenals and magazines thereon, agreeably to the Act of Congress entitled "An Act to provide for the erecting and repairing of arsenals and magazines, and for other purposes," passed on the second day of April, in the year of our Lord one thousand seven hundred and ninety-four.

II. *And be it further enacted* by the authority aforesaid, That if the person or persons whose land may be chosen for the above mentioned purpose, should not be disposed to sell the same, or if the persons appointed to make the purchase should not be able to agree upon terms with such owner or owners of the said land, the same shall be valued upon oath by a majority of persons to be appointed by the Court of Equity or Court of Common Pleas of this State for that purpose; and the land shall be vested in the United States, upon their paying the amount of such valuation to the owner or owners of such land.

III. *And be it further enacted* by the authority aforesaid, That the said land, when purchased, and every person and officer residing or employed thereon, whether in the service of the United States or not, shall be subject and liable to the government of this State, and the jurisdiction, laws and authority thereof, in the same manner as if this Act had never been passed; and that the United States shall exercise no more authority or power, within the limits of

the said land, than they might have done previous to the passing of this Act, or than may be necessary for the building, repairing, or internal government, of the arsenals and magazines thereon to be erected, and the regulation and management of the same, and of the officers and persons by them to be employed in or about the same: Provided always, that the said land shall for ever be exempt from any taxes to be paid to this State."

VI. ACQUISITION HISTORY OF THE PARCELS OWNED AT THE OAKLAND ARMY TERMINAL.

Parcel No.	*Acreage*	*Date of acquisition of title*
A-114	72	1 15 41—R. 368, 639; *City of Oakland v. United States*, CA 9th, 1942, 124 F. 2d 959, cert. denied 316 U.S. 679.
A-114	182.85 acres (incl. portion of 72-acre parcel acquired 1/15/41	11 14 46—Deed to 199.92 acres (incl. the 182.85 acre tract) dated 7 23 43 (R. 368) was not accepted by the government until the execution of a stipulation dated 11 14 46, filed 12 9 46, in *United States v. 72 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #21758 (R. 639).
A-114	123.33	9 11 53 — Final Judgment, entered 9 11 53 in *United States v. 72 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #21758. (R. 639).
B-206	14.64	9 3 42—R. 368, 639; Declaration of Taking, *United States v. Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
B-209	27.47	4 22 41—R. 368; Deed dated April 29, 1941, recorded Book 4017, p. 485, Alameda County Recorder's Office.
B-210	76.51	3 2 42—R. 368, 639; Deed dated March 2, 1942, recorded Book 4189, p. 197, Alameda County Recorder's Office.

Parcel No.	*Acreage*	*Date of acquisition of title*
B-211	101.53	4 22 41—R. 368; Deed dated April 22, 1941, recorded Book 4017, p. 485, Alameda County Recorder's Office.
B-220	27.75	10 16 47—R. 368, 639; Declaration of Taking, *United States* v. *Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
B-222	5.47	10 16 47—R. 368, 639; Declaration of Taking: *United States* v. *Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
C-300	.904	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-302	.158	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-305	.0969	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-306	4.57	5 5 41—R. 368, 639; Deed dated May 5, 1941, recorded Book 4076, p. 31, Alameda County Recorder's Office.

VII. STATE MILK STABILIZATION STATUTES.

Alabama Code, 1955 Revision, Title 22, Secs. 205 et seq.

Arkansas Stats. 1955, Secs. 70-701 et seq.

California Agricultural Code, Division 6, Chapter 17, Sections 4200 through 4420, inc.

Connecticut General Statutes 1958 Revision, Title 22, Chapter 431, Secs. 205 et seq.

Florida Statutes, 1957 Revision, Chapter 501, Secs. 501.01 et seq.

Georgia Code Annotated, 1957 Revision, Title 42, Secs. 42.524 et seq.

Louisiana West's Statutes Annotated, 1958 Revision, Title 40, Secs. 940.1 et seq.

Maine Revised Statutes, 1957 Supplement, Chapter 33, Secs. 1 et seq.

Massachusetts Annotated Laws, 1958, Chapter 94A, Secs. 1 et seq.

Montana Revised Code, 1957 Supplement, Title 27, Secs. 27-400 et seq.

Nevada Revised Statutes, 1958, Secs. 584.350 et seq.

New Hampshire Revised Statutes, 1957, Title XIV, Chapter 183; Secs. 183.1 et seq.

New Jersey Annotated Statutes, 1958, Title 4, Secs. 4.12A-1 et seq.

New York Consolidated Laws Annotated, Book 21, 1958 Revision, Secs. 253 et seq.

North Carolina General Statutes, 1957 Revision, Article 28B, Secs. 106.266.6 et seq.

Oregon Laws, 1961, Ch. 529.

South Carolina Statutes At Large, 1961, Act No. 319, page 512.

Pennsylvania Purdom's Annotated Statutes, 1958 Revision, Title 31, Secs. 700J-103 et seq.

Rhode Island General Laws, 1958, Title 21, Secs. 21-4-1 et seq.

Vermont Statutes Annotated, 1948, Title 6, Secs. 2502 et seq.

Virginia Code, 1958, Title 3, Secs. 3-346 et seq.

Washington Session Laws, 1961, Ch. 298.

VIII. LEGISLATIVE HISTORY OF THE RELEVANT PROVISIONS OF 10 U.S.C. 2304

Section	*Source*	*Comment*
"2304(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—"	Revised Statutes, Sec. 3709; Sec. 10, Act of March 2, 1861, 12 Stat. 214, 220	
"2304(a)(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;"	Act of June 28, 1940, 54 Stat. 676; Act of July 2, 1940, 54 Stat. 712; First War Powers Act, 55 Stat. 839	
"2304(a)(2) the public exigency will not permit the delay incident to advertising;"	Revised Statutes, Sec. 3709; Sec. 10, Act of March 2, 1861, 12 Stat. 214, 220	R.S. 3709 provided that advertising was required "when the public exigencies do not require the immediate delivery of the articles or performance of the services" but that "when immediate delivery or performance is required by the public exigency, the articles or services required may be procured by an open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."
"2304(a)(3) the aggregate amount involved is not more than $2,500;"	Act of June 12, 1906, 34 Stat. 258; Act of March 2, 1907, 34 Stat. 1193	

Section	*Source*	*Comment*
"2304 (a) (4) the purchase or contract is for personal or professional services;"	Revised Statutes, Sec. 3709; Act of March 2, 1861, 12 Stat. 214, 220	
"2304 (a) (5) the purchase or contract is for any service by a university, college, or other educational institution;"	Act of August 13, 1946, 60 Stat. 1057	
"2304 (a) (6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;"	Revised Statutes, Sec. 3721; Act of March 3, 1845, 5 Stat. 794	
"2304 (a) (7) the purchase or contract is for medicine or medical supplies;"	Revised Statutes, Sec. 3721; Section 2(k), Act of October 10, 1940, 54 Stat. 1110	
"2304 (a) (8) the purchase or contract is for property for authorized resale;"		"Purchase for ships' stores, and commissaries, and other similar activities are generally not made by specification, but by brand names, with a view toward accommodating the brand preferences of persons authorized to use such facilities. Therefore the power to negotiate is required because of the proprietary nature of the articles." House Report, No. 109, 80th Congress, 1st Sess., p. 8.

Section	*Source*	*Comment*
"2304(a)(9) the purchase or contract is for perishable or nonperishable subsistence supplies;" The words "or nonperishable" were added by the Act of August 28, 1958, 72 Stat. 966, 967.	Revised Statutes, Sec. 3721; Act of March 3, 1845, 5 Stat. 794	R.S. 3721 which authorized the Secretary of the Navy to purchase butter or cheese without advertisement, was enlarged to cover all perishable supplies purchased by all services.
"2304(a)(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;"	Act of March 2, 1901, 31 Stat. 905	Act of March 2, 1901, 31 Stat. 895, 905, authorized Quartermaster's Department, United States Army, to purchase supplies without advertisement "where it is impracticable to secure competition."
"2304(a)(11) the purchase or contract is for property or services that he determines to be for experimental, development, or research work, or for making or furnishing property for experiment, test, development, or research;".	Act of August 1, 1946, 60 Stat. 779, 780	
"2304(a)(12) the purchase is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;"	Act of May 11, 1908, 35 Stat. 125; Act of May 15, 1936, 49 Stat. 1277; Act of July 13, 1939, 53 Stat. 1000	

Section	Source	Comment
"2304 (a) (13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;"		"By reason of the growing use of mechanized equipment and the growing diversity of makes of equipment capable of performing identical operations, the maintenance of stores of replacement parts is becoming more and more burdensome and uneconomical. The agencies should be empowered to hold within reasonable bounds the number of diverse makes of machines or other items used for a specific purpose." House Report, No. 109, 80th Congress, 1st Sess., p. 31.
"2304 (a) (14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made or would unduly delay the procurement of that property; or"		This subparagraph enables the Departments to "maintain necessary standards of quality control in a way not possible when procurement is by bid and award pursuant to general specifications." House Report, No. 109, 80th Congress, 1st Sess., p. 12.

Section	Source	Comment
"2304(a)(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;"		"It all too frequently occurs that bidders quote identical prices, or that bids in a particular industry fluctuate so as to appear to permit distribution of the Government's business in accordance with a formula agreed upon by the bidders, or that the number of bids received appears to have been restricted by prearrangement amongst the possible bidders. "It is necessary in such situations that the agencies have the power to inquire into the reasons why they are not securing the benefits of competition. That can only be done if they are granted the power to negotiate for the purchase of supplies or services where they believe that the bid prices are not reasonable or have not been arrived at independently." House Report, No. 109, 80th Congress, 1st Sess., p. 31

Section	*Source*	*Comment*
"2304(a)(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or"	Act of June 16, 1938, 52 Stat 707	
"2304(a)(17) negotiation of the purchase or contract is otherwise authorized by law."		"This exclusion preserves the effect of exceptions created by temporary legislation and by statutes not repealed by Section 11 of this Statute. Sec. 11, Armed Services Procurement Act of 1947, 62 Stat 21]." House Report, No. 109, 80th Congress, 1st Sess., p. 32

JOHN F. DAVIS CLERK

No. 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

UNITED STATES OF AMERICA ..... Appellees

vs.

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California, ... Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

AMICUS CURIAE BRIEF FOR THE STATE OF MISSISSIPPI

JOE T. PATTERSON, Attorney General of the State of Mississippi

JOHN L. HATCHER, Attorney for the Mississippi Milk Commission

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INTRODUCTORY STATEMENT

This Brief Amicus Curiae on the merits of this cause is being submitted by the State of Mississippi, through its Attorney General, and the Mississippi Milk Commission, an agency of the State of Mississippi, pursuant to the provisions of Rule 42 of the Revised Rules of the U. S. Supreme Court. The State of Mississippi believes that the determination of the legal questions involved in this case is of paramount concern to the citizens of the State of Mississippi and that to uphold

the decision of the United States District Court for the Northern District of California would be contrary to the best interest of the citizens of this State. By virtue of Rule 42 (4), the consent of the United States, Appellee, to the filing of this brief is not required, and it is respectfully requested that this Court permit this brief to be filed in this cause.

On May 11, 1960, the Legislature of the State of Mississippi enacted the Milk Commission Act, the same being Sections 4560-141 through 4560-170, inclusive, Mississippi Code Annotated (1942), as amended, which created the Mississippi Milk Commission, composed of the Commissioner of Agriculture and Commerce of the State of Mississippi and six other members representing milk producers, distributors, retailers and consumers, for the purpose of carrying out the provisions of said Act and gave said Commission the power to supervise, investigate and regulate the fluid milk industry in the State of Mississippi. The Mississippi Milk Commission was given the power to fix minimum producer, wholesale and retail prices throughout the State of Mississippi, and pursuant to said authority, the Commission has now divided the State of Mississippi into six marketing areas and has fixed minimum producer, wholesale, and retail prices within each of said marketing areas (Section 4560-155, Mississippi Code Annotated (1942), as amended).

The immediate question to be determined in this case will vitally affect the application of milk pricing orders of the Mississippi Milk Commission to sales of milk by licensees of the Commission to military installations owned by the United States Government. First, the Mississippi Milk Commission would like to state that it does not intend nor is it attempting to assert jurisdiction over any military installation or any agency or in-

strumentality of the federal government, but that the Commission does and can assert jurisdiction over its own licensees as to the resale price which they charge to their customers. The Commission controls not only the price at which the licensee purchases milk but also the price at which said licensee sells milk to other customers, no matter who that customer may be, and the remedy provided for a violation of the orders of the Commission is directed solely against the licensee in the form of revocation or suspension of the license, or assessment of a penalty in lieu thereof.

Although the immediate question concerns only the sale of milk to military installations owned by the federal government, the decision herein rendered would have a very broad affect in that it would establish a principle which would be applicable to the sale of milk to all federal agencies and instrumentalities within the State of Mississippi and the other states of the union. When you consider not only the military installations, but also the Veterans Administration hospitals, Indian reservations, the U. S. Corps of Engineers, the concessions on national parks, and other federal agencies and instrumentalities within this State, this problem becomes one of paramount importance.

There are now five (5) military installations located within the State of Mississippi which affect the marketing of milk within the State. The problem involved in the sale of milk to military installations can be best illustrated by reference to one of those military installations, the same being Keesler Air Force Base at Biloxi, Mississippi. This military installation is located within one of the six (6) marketing areas of the State of Mississippi, said marketing area being designated as the Gulf Coast Marketing Area, which area has been des-

clared to be a natural marketing area by both the Mississippi Milk Commission and the Secretary of Agriculture of the United States acting pursuant to authority contained in the Agricultural Marketing Agreement Act of 1937. Minimum producer prices are now fixed by the Mississippi Milk Commission and the United States Department of Agriculture, and minimum wholesale and retail prices are fixed by the Mississippi Milk Commission within this marketing area. The milk sold to this military installation during the year 1961 amounted to 22.6 per cent of the total packaged milk sales made in said Gulf Coast Marketing Area. This means that almost one-fourth of the dairy farmers' income is dependent upon the price for which milk is sold to this one military installation, and when the military contract is held by a milk dealer or handler located outside of the marketing area, this would amount to a complete loss of almost one-fourth of the Class I sales to the dairy farmers in the marketing area. Unless these military prices can be regulated, serious damage would result not only to the milk dealers or handlers, but also to the dairy farmers whose net income is determined by the utilization of milk at the wholesale and retail level, over which he has absolutely no control.

A real danger to the effective enforcement of the Milk Commission Act of the State of Mississippi lies in the existing sales of milk by milk dealers to the United States at lower prices than the price required for all other sales. The route of milk from the producer to consumer is a continuous one, and the evil effect of sub-standard prices to the federal government flows backward to play its part in undermining the intelligent production and orderly marketing that the state has declared essential to the public health. A primary pur-

pose of the Milk Commission Act is to insure a sufficient supply of wholesome milk to the consuming public and to insure an adequate return to the members of the dairy industry, which purposes cannot be accomplished unless the high cost of maintaining sanitary standards and standards of purity at the dairy farm is returned to the producer. If the federal government is permitted to purchase milk at sub-standard prices, the immediate result will be a loss to the processing plants, distributors and producers in the State of Mississippi. This being true, the Mississippi Milk Commission, in discharging its obligation to both the dairy industry and all the inhabitants of the State of Mississippi, would inevitably be forced to eventually raise prices to the consumer in the State of Mississippi. No matter how you look at it, certain people within the State of Mississippi will be severely damaged or injured by the federal government procuring milk at sub-standard prices.

In both the post exchanges and the commissaries the retail sales prices are substantially below competitive retail prices in the stores because purchasers pay no state or municipal taxes, and because the post exchanges and commissaries pay no income taxes, have their stores built for them, spend little for advertising or promotion, and use commissioned officers in the armed forces to manage the enterprises. This combination of freedom from local taxes, low overhead expenses, and intense competition between distributors willing to dispose of milk at by-product prices results in a resale price for fluid milk in post exchanges, service clubs and commissaries far below the comparable retail store price. To add injury, these commissaries often sell at a price below their own inventory price. It is a little wonder that

these commissaries sell such a tremendous volume of milk.

Also under military regulations, the milk purchased at a commissary is supposed to be utilized solely by service personnel and certain designated civilian personnel. However, these regulations have never been enforced and it is quite common for a service man or designated civilian living within a community to purchase milk at the commissary in large quantities and return to the community and distribute same to the entire neighborhood in which he lives. This creates instability and chaos within the entire city in which the military installation is located. This not only places the federal government in direct competition with private enterprise, which in itself is contrary to fundamental principles of law, but in addition gives this same federal government a tremendous price advantage in competition with such private enterprise.

The problem is a complex one. Commissaries were not created to make money. They are operated by government employees paid out of tax money, and their mark-up is supposed to cover shrinkage, and not operating costs. It is difficult to distinguish between those who have commissary privileges and those who do not have them, and, since there is no limit on purchases, such a distinction would not make a great deal of difference in any event. Thus, we find a serious situation where government stores maintained by tax money sell merchandise at ridiculously low prices in direct competion with stores and milk distributors who pay the taxes that keep the commissaries in business.

THE LEGAL PRINCIPLES INVOLVED IN THIS CASE

The legal authorities hereinafter cited, in relation to this problem of the sale of milk to federal agencies, usually deal with two principles or theories of law, which are as follows:

(1) The question of jurisdiction over the federal enclave whether the federal or state government exercises exclusive jurisdiction or both of them exercise concurrent jurisdiction over this federal territory. Article I, Section 8, Clause 17 of the Constitution of the United States, in effect provides that land cannot be acquired by the federal government without the consent of the state, which means that the federal government acquires only such jurisdiction as is ceded to it by the states. The statutes of each particular state which were in effect at the time of the acquisition of the property concerning the cession of jurisdiction by the state are appropriate in determining this question.

(2) The supremacy clause of the United States Constitution, which states that statutes of the United States Congress shall be supreme and must prevail over any state law which conflicts therewith (Article VI, Clause 2, Constitution of the United States). If there is no conflict between the state milk control regulations and the applicable federal procurement act concerning this particular sale of milk, then the state regulation would stand since there is no conflict with the federal act.

There have been only two decisions handed down by the Supreme Court of the United States concerning the applicability of state price fixing regulations on sales of milk by a milk dealer to a federal agency, both of these decisions being concerned with the sale of said

milk to military installations. Both of these decisions were handed down on the same date, March 1, 1943, and at first glance would seem to be directly in conflict as the result was exactly the opposite in each case. However, the decision in each case turned upon the first question stated above, that being the question of jurisdiction and the extent to which same had been ceded by the state government in each case. The case of *Penn Dairies, Inc. et al v. Milk Control Commission of Pennsylvania*, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943), came up on appeal from the State of Pennsylvania and concerned the validity of the price fixing orders of the Milk Control Commission on the sale of milk by a licensee of the Commission to the military installation involved. In this case the land had been leased by the state to the federal government and it was conceded by the U. S. Attorney that the state had exclusive jurisdiction over the area occupied by the military installation. The Supreme Court held that the orders of the state Milk Control Commission were applicable and could be enforced by the state. On the question of jurisdiction, the court held in favor of the state. As to the question of the supremacy clause, the court stated that we may assume that Congress, pursuant to the supremacy clause, Article VI, Clause 2, could declare such state regulations inapplicable to sales of milk to the government, but that Congress has not so done, and that no clause in the Constitution, unaided by Congressional enactment, can be implied to prohibit such state regulations. The court stated that in the absence of Congressional consent there is an implied constitutional immunity of the federal government from state taxation and from state regulation of the performance by federal officers and agencies of governmental functions, but that

those who contract to furnish supplies and render services to the government are not such state agencies and do not perform governmental functions. The mere fact that nondiscriminatory regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. The Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to levy taxes and to regulate their internal affairs and policies and that state regulations like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state borders.

To establish a conflict under the supremacy clause of the Constitution in the Penn Dairies case, the United States relied upon the Armed Forces Procurement Act which required competitive bidding in the purchase of supplies for the Army. The Supreme Court held that said statutes, being the federal statute and the state statute, are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition". Since the Armed Forces Procurement Act eliminated the requirement of competitive bidding where it was "impracticable to secure competition", the court held that there was no conflict under the supremacy clause.

The other case was *Pacific Coast Dairy, Inc. v. Department of Agriculture of California et al*, 318 U.S. 285, 63 S.Ct. 628, 87 L.Ed. 761 (1943), which came up on

appeal from the State of California concerning the validity of state price fixing orders on the sale of milk by a licensee to a military installation in the State of California. In this case the land was actually purchased by the federal government, and it was conceded and admitted by the attorney for the state that the federal government had exclusive jurisdiction over the federal enclave. Since the state has ceded exclusive jurisdiction to the federal government, the Supreme Court held that the state laws were inapplicable within the federal enclave of the military installation and that the court was bound to respect the relevant constitutional provision with the respect to the exclusive power of Congress over federal lands. Having disposed of the case on the ground that exclusive jurisdiction was in the federal government, it was unnecessary for the Supreme Court to consider the supremacy clause, but it should be kept in mind that on this same day this same Supreme Court held that there was no conflict between the Armed Forces Procurement Act and the state milk pricing regulations of Pennsylvania, which was decided in the Penn Dairies case.

Thus far, the two major legal principles involved, being the questions of jurisdiction and the supremacy laws, have been discussed together in order to give a complete analysis of the Penn Dairies case at one point in this brief without interruption. Hereafter, the two legal principles will be discussed separately.

THE QUESTION OF JURISDICTION OVER THE FEDERAL ENCLAVE

Neither the case of *Penn Dairies, Inc., et al v. Milk Control Commission of Pennsylvania*, supra, nor the case of *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, supra, can be relied upon by either

the United States or the State of California in support of their contentions on jurisdiction in the case now before this Court. In both of said cases the question as to which governmental authority had exclusive jurisdiction was conceded by the United States in one case and the State in the other, and a factual question was not presented for decision in either of said cases. In the case now before this Court, a factual question is presented on the question of jurisdiction, and the State of Mississippi concurs with the position taken by the State of California and believes same to be fully supported by the facts and the law presented in this case.

In the event that this Court makes a decision contrary to the position of the State of California on the question of jurisdiction, the State of Mississippi respectfully requests that the Court's opinion be so limited so as not to preclude the position taken by other states who might have completely different statutes concerning the cession of jurisdiction to the federal government. The statutes in Mississippi on this question, being Sections 4157 and 4158, Mississippi Code Annotated (1942), are as follows:

> 4157. The governor, upon application made to him in writing, on behalf of the United States, for the purpose of acquiring and holding lands or using any part of a public road of any county within the limits of this state for the purpose of making, building, or constructing levees, canals, or any other works in connection with the improvement of rivers and harbors or as a site for a fort, magazine, arsenal, dockyard, courthouse, custom house, lighthouse, post office, or other needful buildings, or for the purpose of locating and maintaining national military parks, or for any other public works or purposes accompanied by proper evidence of the purchase of such lands, or the con-

sent of the board of supervisors of the proper county for such public roads to be used for said purpose, is authorized for the state to cede jurisdiction thereof to the United States for the purpose of the cession and none other.

4158. The concession of jurisdiction to the United States over any part of the territory of the state, heretofore or hereafter made, shall not prevent the execution on such land of any process, civil or criminal, under the authority of this state, *nor prevent the laws* of this state from operating over such land; saving to the United States security to its property within the limits of the jurisdiction ceded, and exemption of the same, and of such land from taxation under the authority of this state during the continuance of the cession. (Emphasis Supplied)

It is to be noted that Article I; Section 8, Clause 17 of the Constitution of the United States provides that the land must be acquired with the consent of the "Legislature" of the particular state. The Mississippi statute above quoted has been in effect since 1892 and although the first section (4157) authorizes the "governor" to cede jurisdiction to the United States, the second section (4158) restricts the effect of such cession of jurisdiction by stating that same shall not prevent the laws of this state from operating over such land, and the governor therefore has no authority to cede jurisdiction to the extent that the laws of the state shall not continue to operate over such lands.

Apparently the laws of the various states differ as to the extent to which jurisdiction is ceded to the United States in the acquisition of territory for federal purposes, with some states ceding all jurisdiction exclusively to the United States and other states reserving concur-

rent jurisdiction with the federal government. To have some states regulate the price on milk sold to federal agencies and to eliminate such regulation in other states would not be completely desirable, but sometimes legal consistency produces practical inconsistency. Also, it is conceivable that different applications of state law would prevail as between military installations within the same state, when the cession statute provides certain conditions to be met by the United States prior to the acquisition of exclusive jurisdiction, in which case some military installations would have met the conditions while others have not.

It would certainly seem more practical and more in harmony with the co-existence of state and federal laws throughout the nation as a whole to eliminate the legal technicalities involved and establish a national policy which is in accord with the Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas within the States, Government Printing Office, Volume 1, 1956, page 70, which states as follows:

> "With respect to the large bulk of federally owned or operated real property in the several states and outside of the District of Columbia, it is desirable that the federal government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest and statutes only, with legislative jurisdiction remaining in the several states."

There are numerous related fields of state legislation which are recognized and required to be observed by federal agencies, in which cases the contractor must certify to the federal government that he has complied with certain state laws, such as minimum wage requirements, quality of construction, and various other matters

which result in an increase in the price of the product or service being furnished to the federal government. Government contractors can be required by the state to pay sales and use taxes upon materials used in a cost-plus fixed fee contract, *Alabama v. King & Boozer, et al.* 314 U.S. 1 (1941), *Curry Commissioner of Revenue of Alabama v. United States et al.* 314 U.S. 14 (1941), and to pay a nondiscriminatory advalorem tax on their possessory interest in government owned materials and equipment. *City of Detroit et al v. Murray Corporation of America et al.* 355 U.S. 489 (1958). The effect of these working and wage provisions and the impact of these taxes serve to increase the cost of goods and services purchased by the government. This being so, there is good reason for the respective states, acting to protect the public health, to require distributors selling milk to the United States to adhere to its minimum price requirements.

The United States is apparently contending that the United States has complete sovereignty over the territory involved and that the law of Mississippi or any other state as to such territory is as "foreign as is the law of China" (Mr. Justice Frankfurter dissenting, *Pacific Coast Dairy v. Department of Agriculture*, supra). The effect of this contention would be to deprive the residents of such territory of the privileges of state citizenship. For example, this would affect the rights of residents of such areas to have their children educated in the public schools, to vote, to hold public office, to sue for divorce, or to have their persons, property or affairs subject to probate in the state courts. Similarly, a state could, if it chose to do so under this theory, deny such a resident the privileges granted only to state citizens, such as the right of employment by the state or

local government, the right to receive a higher education at a state institution at a favorable tuition, the right to acquire hunting and fishing licenses at low cost, the right to receive visiting nursing service and care in county hospitals, and the right to receive the services of local departments of health. It is quite apparent that the residents on these federal installations would be willing, and in fact, would demand, the acknowledgment of their "rights" of state citizenship but that these same persons are unwilling and refuse to accept the "responsibilities" of such citizenship.

Therefore, it would certainly seem desirable and feasible to eliminate the legal technicalities, and inconsistencies that result therefrom, on the question of jurisdiction over the federal enclave, and to let the sole question in each case revolve upon a determination as to whether or not there exists a conflict between federal and state laws in each particular case and whether or not the state law would interfere with the particular function being performed by the United States on the territory involved. However, if such uniformity can not be achieved within the framework of the law, the State of Mississippi requests that this Court clarify its decision so as to permit Mississippi to continue to exercise concurrent jurisdiction over federal installations within this state in accordance with the cession statutes of Mississippi.

THE CONFLICT BETWEEN FEDERAL AND STATE LAWS UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

In the case now being considered by this Court, it is the contention of the United States that the various state milk stabilization laws are in conflict with the Armed Forces Procurement Act of 1947, 10 U.S.C. 2304

et seq., 62 Stat. 21; in its requirement that supplies be procured through competitive bidding. This is their contention in spite of the fact that the same Congress of the United States has specifically declared in Section 204 (a) of the Agricultural Act of 1954, 68 Stat. 899, as follows:

> "The production and use of abundant supplies of high quality milk and dairy products are essential to the health and general welfare of the Nation; . . . and an economically sound industry affects beneficially the economy of the country as a whole. It is the policy of Congress to assure a stabilized annual production of an adequate supply of milk and dairy products . . . and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared to the cost of things that farmers buy."

The purposes and objectives of the various state milk stabilization laws are identical to this congressional policy. By this same congressional act, the Secretary of Agriculture of the United States is authorized to actually fix minimum producer prices throughout the United States. In the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 610 (1), the Secretary of Agriculture of the United States is *directed* to "confer with and hold joint hearings with the duly constituted authorities of any State; . . . to issue orders complimentary to orders and other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture," all of which is in order to effectuate the declared policy of Congress and to "obtain uniformity in the formulation, administration and enforcement of federal and state programs" in the regulation of

agricultural products. By the Agricultural Marketing Agreement Act of 1937, Congress specifically requires the co-existence of federal and state laws in this field of regulation and has directed the United States Secretary of Agriculture to cooperate in the manner above stated. It would seem unbelievable that the same Congress which has stated its high regard for the welfare of the dairy producer should seek to nullify a state milk stabilization law which has the same legislative objective.

In this case the District Court held that the California milk stabilization laws conflicted with the Armed Forced Procurement Act of 1947, which was in complete disregard of the decision of the Supreme Court of the United States that held directly the opposite in the case of *Penn Dairies, Inc., et al. v. Milk Control Commission*, supra. The decision of the Supreme Court rendered in 1943 was based upon the fact that the procurement act in force at that time eliminated the requirement of competitive bidding for supplies or services "for which it is impracticable to secure competition", which is one of the identical exceptions allowed in the Armed Forces Procurement Act of 1947 and presently in effect as of this date.

An examination of the legislative history of the Armed Forces Procurement Act of 1947, 62 Stat. 22, 10 U.S.C. 2301 et seq. and its construction by the United States Supreme Court requires a negative answer to the claim of the United States. The 1947 federal procurement act was "a comprehensive revision and restatement" of the laws governing the procurement of supplies and services by the War and Navy Departments (House Report Number 109, 80th Congress, First Session, page 6, with previous statutes codified into the 1947 act being listed on pages 23-26; Senate Report

Number 571, 80th Congress, First Session, page 2). For example, the requirement that invitations for bids for goods and services be advertised (10 U.S.C. 2304 (a)) is derived from Section 10 of the Act of March 2, 1861, 12 Stat. 214, 220 which was codified into Section 3709 of the 1875 Revised Statutes. The authority in Section 2 (c)(10) of the Act (10 U.S.C. 2304 (a)(10)) allowing contracting by negotiation where "it is impracticable to secure competition" derives from the Appropriation Act of March 2, 1901, 31 Stat. 895, 905, 1875 Revised Statutes, Section 3721, 29 Stat. 370 (House Report Number 109, 80th Congress, First Session, page 8; Senate Report Number 571, 80th Congress, First Session, page 8).

While the requirement of advertising for bids was basic to the 1947 Act, the exceptions set forth in Section 2 (c) of the Act (10 U.S.C. 2304 (a)(1) to (17)) proved to be the rule. Under Section 2 (c)(3) of the Act (10 U.S.C. 2304 (a)(3)) contracts could be negotiated if the aggregate amount involved less than $1,000.00. Under this exception, 94% of the dollar value of all contracts executed under the Act between January 1, 1953, through June 30, 1955, were negotiated rather than advertised (House Report Number 1688, 84th Congress, Second Session, page 3).

Contracts could be negotiated if the purchase is for resale (10 U.S.C. 2304 (a)(8)); or if the purchase is for perishable subsistence supplies (10 U.S.C. 2304 (a)(9)). Purchases for resale were excepted from the advertising requirement since "Purchase for ship's stores, post exchanges, commissaries, and other similar operations are generally not made by specification but by brand names, with a view toward accommodating the different tastes and demands of persons availing them-

selves of their facilities. Also, inasmuch as government funds are not used or are not subject to the hazards of business loss, the goods being subject to resale, there is little need for a requirement that purchases be affected by advertising procedure. *It is quite necessary, on the other hand, to afford such activities the same leeway and discretion as privately owned and managed merchantile enterprises*" (House Report Number 109, 80th Congress, First Session, page 30). (Emphasis Added).

Since the Armed Services Procurement Act of 1947 incorporated these earlier federal statutes, the law remains that contractors selling milk to the federal government must comply with the state minimum milk price statutes. For example, 10 U.S.C. 2304 (a)(10) provides for the procurement of property by negotiation where "the purchase or contract is for property or services for which it is impractical to obtain competition." Senate Report Number 571, 80th Congress; First Session page 8 (1947), gives as an example of "impracticality" the situation where "prices are set by law or regulation . . . ." To the same effect is House Report Number 109, 80th Congress; First Session, page 3. Presumably in the case of milk, this "impracticality" would occur under either a state milk stabilization statute, or under any of the federal milk marketing orders promulgated under the Agricultural Marketing Agreement Act of 1937.

The federal procurement law for other federal agencies (41 U.S.C. 251 et seq.) also provides the same exception for negotiated rather than adv rtised prices by permitting same "for property or services for which it is impracticable to secure competition."

THE EFFECT OF STATE LAW UPON FEDERAL PROPERTY UNDER THE ASSIMILATIVE CRIMES ACT

Even if it were to be construed that the federal government had exclusive jurisdiction over the military or other federal installations, a violation of the orders of the Mississippi Milk Commission are made misdemeanors within the Milk Commission Act, and the criminal laws of the State of Mississippi would be operative therein by virtue of the Assimilative Crimes Act, 18 U.S.C. 13, which provides as follows:

> "Whoever, within or upon any of the places now existing or hereafter reserved or acquired as provided in Section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

The effect of this statute is to make state criminal laws effective upon federal installations and the federal government thereby adopts the state law as its own. Although this might be a matter of enforcement by federal officials, certainly it cannot be denied that a sale of milk below the minimum prices set by the Mississippi Milk Commission would be a violation of federal law and therefore any court would be bound to observe this federal law in any federal proceeding. At this point it should be again noted that the State of Mississippi would enforce the provisions of the Milk Commission Act against the licensee of the Commission, being the

milk dealer or handler, and not the federal agency itself. Also, the Supreme Court of the United States has specifically held that the Armed Forces Procurement Act is not in conflict with the state milk regulations. Therefore, a bid submitted by a milk dealer or handler to a federal agency at below the minimum prices fixed by the Milk Commission would not only be a violation of state law but would be a violation of federal law as well.

Previous enactments of the Assimilative Crimes Act specified a certain date therein, which meant that state laws enacted after said date were not assimilated, and previous court decisions so held. The statute as enacted in 1948 omits the specification of any date, which not only would adopt previous state laws but will authorize the federal courts to assimilate future state laws. In other words, the federal statute as now enacted makes offenses committed on such federal reservations the law of the place that would govern if the reservation had not been ceded to the United States.

There can be no doubt but that the Milk Commission Act is in effect on the federal land involved, the only question being whether same constitutes federal or state law and whether violations should be prosecuted in the state or federal courts.

CONCLUSION

Therefore, the State of Mississippi concurs with the State of California as to the legal questions involved in this case, and it is respectfully requested that this Court give this matter its utmost and careful consideration as the decision in this case will have a profound effect upon the dairy industry and the members of the consuming public within the State of Mississippi.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, as Attorney General for the State of Mississippi, do hereby certify that a true and correct copy of the foregoing amicus curiae brief on the merits was this day deposited by me in a United States Post Office or mail box, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington 25, D.C.

This the 29th day of August, 1962.

Joe T. Patterson

Joe T. Patterson, Attorney General
for the State of Mississippi

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

UNITED STATES,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

AMICUS CURIAE BRIEF OF PETALUMA COOPERATIVE CREAMERY IN SUPPORT OF POSITION OF APPELLANTS

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BRIEF FILED WITH CONSENT OF PARTIES

All parties to this case have consented to the filing of this brief. Their written consents have been filed concurrently herewith.

INTEREST OF AMICUS CURIAE

Petaluma Cooperative Creamery is a nonprofit cooperative association, organized in corporate form under Section 1190 et seq., California Agricultural Code. Petaluma Cooperative Creamery (hereinafter referred to as "Petaluma Co-op") has been continuously engaged in the production and marketing of milk and other dairy products since its founding in 1913. Its membership is comprised of 275 independent milk producers who own and operate dairy farms in the North Coastal counties of California. Each of these dairy farmers, and Petaluma Co-op, are "small business concerns" within the meaning of the Armed Forces Procurement Act of 1947 (62 Statutes 21, 10 U.S.C. 2301 et seq.), an interpretation of which is a primary issue in this case.

Petaluma Co-op's dairy-farmer members own dairy farms in Marin, Sonoma, Napa, Lake and Mendocino Counties in California. Among them and through Petaluma Co-op, they produce 20 million gallons of fluid milk each year. This is approximately one-fortieth of the entire annual fluid milk production of California. The entire 20-million gallon output is shipped to Petaluma Co-op. Approximately 60% of this milk is resold to other milk distributors.

All of Petaluma Co-op's functions are performed under the California Milk Stabilization Act (Sections 4200 to 4420, inclusive, California Agricultural Code). As a producer of milk, Petaluma Co-op receives a producer price for the milk sold to other distributors. The producer price is established for

Petaluma Co-op's marketing area by the Director of the California Department of Agriculture (Section 4246, *Ibid.*). Petaluma Co-op is also a distributor of milk ("Producer-distributor," Section 4217, *Ibid.*). As such, it sells the remaining 40% of its members' production to retail stores and consumers. Under the California Act, the price received for this category of milk is the minimum wholesale or retail price also established by the Director (Sections 4350 et seq., *Ibid.*). These latter prices are based, *inter alia,* upon the production and handling costs of milk distributors, including Petaluma Co-op (Section 4355 [d] and [e], *Ibid.*).

The price Petaluma Co-op receives for its milk, whether sold by it as a producer or as a distributor, depends upon the classification—i.e., usage—of the milk sold (Sections 4225 to 4231, *Ibid.*). Its most favorable price is the one received for milk sold for a Class One usage as defined in Section 4226 (*Ibid.*: milk sold in its unconverted natural fluid form for human consumption). The price received for milk sold by Petaluma Co-op as a producer will vary with usage. The price received for milk it sells as a distributor is a Class One price, from which Petaluma Co-op returns the Class One producer price to its members for that milk. In this category, Petaluma Co-op formerly bid on milk contracts for Federal military installations. Its bid in a given instance would be the Class One wholesale price it was entitled to recover for the Class One usage involved, less a quantity discount permitted by the Director of the Department of Agriculture under State law.

Under the injunction presently in effect in this case, the low-bid price collectible by Petaluma Co-op in military business must necessarily be less than the discounted Class One wholesale price to which it would be entitled under the California Act. As stated above, the computation of this State-controlled price includes factors for Petaluma Co-op's production and handling costs as a milk distributor. Engaging in military business on a competitive low-bid basis means, therefore, selling "military milk" below cost. Petaluma Co-op, finding this to be an economic impossibility, has therefore been compelled to withdraw from the military market. The direct result of its withdrawal has been a reduction in its gross revenue amounting approximately to $14,000.00 each month, or $170,000.00 annually. This sum is vital to Petaluma Co-op's operating margin as a cooperative association, and to its 275 farmer members.

Amicus has recited the foregoing facts to define its important interest in the determination of the questions presented by this case. Typically, its interest is measured and presented economically—in terms of dollar loss. Its interest might also be stated *legally* by reason of the present status of the injunction imposed upon it in this case. Petaluma Co-op's dual identity as a producer *and* distributor is a functional illustration of the important conjunctive relationship between producer pricing *and* distributor pricing under the California Milk Stabilization Act.

The judgment entered by the three-judge district court herein permanently enjoined appellant State

officers from the enforcement of producer pricing and distributor (wholesale) pricing of milk purchased by distributors to officers' clubs, post exchanges, commissaries and mess halls at Castle Air Force Base (Castle), Travis Air Force Base (Travis) and Oakland Army Terminal (Oakland). Thereafter, upon appropriate proceedings in this court, the injunction against enforcement of producer pricing—and only producer pricing—was stayed.

The consequent dichotomy has been an additional reason for Petaluma Co-op's forced withdrawal from the military milk business. The District Court has in effect enjoined its recovery of a State-controlled wholesale price in the military market. The State law, however, still requires it to pay its producer members a State-controlled price for the same milk. Petaluma Co-op recites these additional facts to indicate that it has a substantial legal interest in the determination of the questions now before this Court. They serve, further, to illustrate that enforcement of the California Milk Stabilization Act should be permitted as to both price categories—not as a matter of convenience to Petaluma Co-op, but because its present anomalous situation demonstrates that the *conjunctive* relationship between producer pricing and wholesale pricing under the State law is the legal and economic heart of the State law itself.

ARGUMENT

The function of Appellants and their Amici Curiae —in any case—is immemorial and demonstrable: to claim and prove error in the deliberations of the court below. The case (originally two cases) at bar was decided below without a trial on the merits and upon motions and affidavits. 190 F. Supp. 645, 659-660. The District Court's subsequent memorandum opinion on the motions before it (190 F. Supp. 645) was adopted as the findings of fact and conclusions of law in the action. R. 648. If error appears, therefore, it appears in the District Court's opinion.

A summary view of the opinion indicates that the District Court first held and found that, under two provisions of the Constitution of the United States,[1] the California Milk Stabilization Act could not constitutionally be enforced, because the United States had exclusive jurisdiction in each instance, at:

(1) Oakland (190 F. Supp. 645, at 649-652);

(2) Travis, jurisdiction having assertedly been transferred to the United States concurrently with, and collateral to, its land acquisitions at Travis (190 F. Supp. 645, 652-653); nor, for the same reason, at

(3) Castle (190 F. Supp. 645, 653-654); and

(4) Alternatively, and by operation of the Supremacy Clause,[2] that the California Milk Stabilization Act " 'places a prohibition on the Federal Government' . . . and, therefore, so conflicts with federal

[1] Article I, Section 8, Clauses 11-16 (War Clauses); *Ibid.*, Clause 17 (Power of Exclusive Legislation).

[2] Article VI, Clause 2, Constitution of the United States.

procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2." (190 F. Supp. 645, 657).

This Court, by order entered January 15, 1962, requested briefs and arguments on the question of its jurisdiction on direct appeal under 28 U.S.C. 1253, and postponed consideration of the jurisdictional question until a hearing of this cause on its merits. 368 U.S. 965. Appellants' Brief ("Jurisdiction," Page 2 et seq.) fully argues Appellants' position on the jurisdictional question. Amicus Curiae adopts Appellants' position in this regard and their supporting argument: and joins Appellants in the assertion (Page 10, *Ibid.*) that "this Court has jurisdiction of these direct appeals under 28 U.S.C. 2281. (Citations)."

Alternatively, Amicus adopts Appellants' position in seeking a writ of certiorari, as set forth in Appellants' separate petition before the Court.

In claiming error by the District Court, Amicus argues that:

(1)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER OAKLAND ARMY TERMINAL.

The District Court held and found (190 F. Supp. 645, 650) that the State of California consented to the Oakland land acquisitions in the language of Section 126 of its Government Code.[3]

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[3]The text of Section 126, Government Code, as amended (Statutes 1st Ex. Sess. 1946, Chapter 154, Page 199, as amended, Statutes of 1947, Chapter 1532, Page 3163, read in relevant part as follows:

This cannot be entirely true as to the fact of consent alone, apart from the fact of transfer of jurisdiction. Section 126 required—as a clear condition of California's consent becoming an executed fact—that the State Lands Commission must make findings, and recorded orders or resolutions, that the acquisition is "within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States," that it complies with Federal law, that the United States has acquired title and has "in writing . . . assented to jurisdiction over the land," and that the "acquisition is in the interest of the State."

With regard to Oakland, the United States "assented to jurisdiction in writing" by application filed with the State Lands Commission by the Department of the Army on July 5, 1950. R. 368. The State Lands Commission, by resolution adopted October 5, 1950, found the conditions to have existed. R. 140, 148.

". . . the Legislature of California *consents to the acquisition by the United States of land within this State* upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law:*

"(a) The acquisition must . . . within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

"(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

"(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and *subject to each and all of the conditions and reservations in this section prescribed;*

"(d) . . .

"(e) In granting the consent, the Legislature and the State reserve . . . the State's entire power of taxation . . .; and reserve to all persons residing on such land all civil and political rights . . . which they might have were this consent not given." (Emphasis added.)

But the Oakland enclave was acquired by piecemeal fee acquisition of eleven (11) parcels of land between January 15, 1941, and September 11, 1953,[4] and by lease of fourteen others. The July 5, 1950, "assent to jurisdiction" by the Secretary of War included descriptions of ten (10) of the parcels and a portion of another.[5] It did not include 123.33 remaining acres of the eleventh fee parcel (acquired later), nor any of the fourteen leased parcels. By force of Section 126 of the California Government Code, the vital "assent to jurisdiction" by the United States, as an element of State consent to the acquisition, is an executed fact only in part.

Partial consent may exist, effective as to some parcels of land and not others. This is not to say, however, that the part-cloak of *consent* brings with it a part-mantle of *jurisdiction*. It would distort reason as well as history to conclude that State jurisdiction, residual in the Oakland enclave for lack of Federal assent as to one parcel of land, lapses when it reaches the boundary of another parcel.

State consent at Oakland, then, is incomplete in terms of *area*. Its incompleteness dramatically illustrates the error implicit in the finding that consent *ipso facto* operates to transfer exclusive jurisdiction. The element of consent is a single fact. The element of a transfer of exclusive jurisdiction is another.

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[4]See detailed list of Oakland parcels, Brief For Appellants, Pages 130, 132; *Ibid.*, Appendix, Page 231.

[5]Parcel A-114, excluding 123.33 acres acquired September 11, 1953. R. 93-94, See reference *supra*, Footnote 4.

Either fact stands proven or not: but the latter, clearly, cannot be found to exist as a passenger on the dubious vehicle of the former.

This is even more evident upon an examination of Section 126 itself. In its functional language, "the Legislature of California consents to the *acquisition by the United States of land . . .*" (Emphasis added). With this language, the Legislature of California does nothing else. Section 126 does not mention jurisdiction, nor its transfer, surrender or passage. The District Court finds the transfer of jurisdiction within the statute by implication.

Rationalizing, its memorandum opinion (190 F. Supp. 645, 650) notes that Section 126 expressly refers to the U. S. Constitution, Article I, Section 8, Clause 17. Section 126 does contain such a reference. The District Court, though, says then that Clause 17 ". . . deals specifically with the acquisition by the United States of 'exclusive legislative jurisdiction' over lands purchased by the United States . . . with the consent of the legislature of the State." Clause 17 does *not* so deal.

Explicitly, Clause 17 deals with the power of the Congress "to exercise exclusive legislation" in areas federally purchased with State consent. By its own terms or otherwise, this endowment of power is not self-executing. The Congressional power has not been exercised at Oakland in the field of milk marketing. Failing such exercise, there is nothing before the Court to support the conclusion that California, acknowledging in its own statute the existence of a con-

stitutional power in the Congress, thereby strips itself of jurisdiction to enforce another of its own statutes.

The District Court acknowledges (190 F. Supp. 645, 651) the concurrent effect, at the time of the Oakland acquisition, of Section 113 of the California Government Code, originally enacted in 1891.[6] In effect, though, it holds that Section 113, reserving State criminal jurisdiction, did not qualify Section 126, conditionally granting State consent to the Oakland land acquisition. The court's holding turns entirely upon a selective reference choosing between the words "ceded" and "conveyed" in Section 113. It reasons that California's legislative intent, in enacting Section 113 in 1891, was derived from this Court's decision in establishing "cession" as a process whereby, in a proper case, a State could transfer to the United States exclusive jurisdiction of a Federal enclave (citing and referring to *Fort Leavenworth R. R. Co v. Lowe,* 114 U.S. 525 [1885]).

The cited historical sequence—an 1891 enactment using the word "ceded" after an 1885 decision validating the fact of "cession"—is perhaps persuasive as to California's legislative *motive* in enacting Section 113. Whether it qualified the 1872 enactment—Section 126—is, however, a matter of legislative *intent*. The intent of the California Legislature, that Section

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[6] As amended (Statutes of 1947, Chapter 1532, Page 3164), Section 113 read:

"The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

113 qualify Section 126, is clear from the plain language employed in Section 113; that California reserves the administration of her criminal laws on "any land over which any jurisdiction has been or may be ceded *or conveyed* to the United States . . ." (Emphasis added). The District Court deals with the disjunctive by ignoring it—holding that "ceded or conveyed" means only "ceded."

Amicus concurs with Appellants' point that the requirement of Federal "assent to jurisdiction" at Oakland was inoperative to transfer jurisdiction because it was incomplete; that, in the context of California law, the fact of State consent to a land acquisition does not *ipso facto* transfer exclusive jurisdiction over the land acquired; and that, at Oakland, California effectively reserved her criminal jurisdiction in any case. (*James v. Dravo Contracting Co.*, 302 U.S. 134, 143 [1937]).

It follows that the California Milk Stabilization Act may be enforced as to contractors delivering milk to Oakland.

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(2)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER TRAVIS AIR FORCE BASE, AND

(3)

THE STATE OF CALIFORNIA RETAINS JURISDICTION OVER CASTLE AIR FORCE BASE.

The District Court held and found (190 F. Supp. 645, at 651-653) that the United States acquired ex-

clusive jurisdiction over Travis and Castle because both were acquired while Section 34, California Political Code,[7] was in effect. As to Parcel "A" at Castle, a successor statute[8] seems to have been in effect. In both statutes, California consented "to the purchase or condemnation by the United States of any tract of land" for the same stated military purposes. In both statutes, California expressly reserved the authority (in Section 34 by reciting an "express condition," in Section 111 by expressly "reserving authority") to serve process and to tax.

As at Oakland, the District Court views consent and sees a surrender of jurisdiction. As at Oakland, Amicus respectfully insists that the one does not yield the other.

The sole authority for the lower court's reasoning as to Travis and Castle is the 1954 opinion by the Attorney General of California (23 Ops. Cal. Atty. Gen. 14 [1954]). The opinion in question does not

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[7]Section 34, California Political Code, as amended (Statutes of 1939, Chapter 710, Page 2231). The text, in relevant part, read:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State, for the purpose of erecting forts, magazines, dockyards, and other needful buildings, . . ."

[8]Statutes of 1943, Chapter 134, Page 898, effective August 4, 1943, succeeded Section 34, Political Code. The prior statute, enacted in 1872, was repealed effective August 4, 1943 (Statutes of 1943, Chapter 134, Page 1009). Section 111, Government Code, provided that:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

support its own conclusions. In it, the Attorney General examined the existence and extent of Federal jurisdiction at Fort Ord, California. A principal point before him involved Section 114, California Government Code.[9] The same point is involved in the case at bar. In the Fort Ord situation, the United States had not filed for record, nor had anyone recorded, the required metes and bounds of the land acquired. In the Travis and Castle acquisition, the United States similarly omitted to make the prescribed recordation. R. 643, 644, 646.

The Attorney General believed in 1954, and the lower court herein agreed in 1960, that jurisdiction passes with consent despite the omission of recordation. The Attorney General ruled that the 1872 statute (Section 34, Political Code—Section 111, Government Code) and the 1897 enactment (Section 114, Government Code) were inconsistent. To avoid finding that the 1897 act repealed its predecessor by implication, he separated them as to scope. He declared that the 1872 statute affected only Federal acquisitions for "constitutional military purposes," the 1897

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[9]Statutes of 1943, Chapter 134, Page 898; based on Statutes of 1897, Chapter 56, Page 51. The text:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which has thereafter been or which may be ceded or conveyed to the United States for such purposes, reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description of metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are located."

statute affecting those "for military purposes or defense other than the constitutionally designated purposes."

This semantic splitoff wholly ignores the plain language of the 1897 statute, which applies to all lands "within this State held . . . by the Government of the United States *for military purposes or defense*, or which may be hereafter ceded or conveyed to said United States for such purposes." This broad range of military purposes does not restrict itself to "non-constitutional purposes."

Further, the opinion—and, by reference to it as sole authority, the District Court herein—relies wholly on this Court's decision in *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930). This reliance was cast without reference to the totally distinguishing fact that, in *Surplus*, this Court was examining a State statute[10] which contained an expression of State consent and an explicit and *unqualified cession of State jurisdiction*. The only cession of jurisdiction by California which would have operated as to Travis and Castle was by reason of the *qualified* language of Section 114, Government Code (quoted *supra*, Footnote 9). The qualification: recordation of descriptions and maps. In or since the Travis and Castle acquisitions

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[10] Arkansas Acts of 1903, Page 346, which provided in part:

"The State of Arkansas hereby consents to the purchase . . . by the United States, of any site or ground for the erection of any armory, arsenal, fort; fortification, navy yard, custom house, light house, lock, dam, fish hatcheries, or other public buildings of any kind whatever, *and the jurisdiction of this State, within and over all grounds thus purchased by the United States . . . is hereby ceded to the United States.*" (Emphasis added.)

by the United States, there has been no recordation. Accordingly, the acquisitions did not meet the *qualifications* of cession of jurisdiction by California; accordingly, there was no cession of jurisdiction; and California's jurisdiction survived and persists at Travis and at Castle, as at Oakland.

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(4)

THE CALIFORNIA MILK STABILIZATION ACT DOES NOT, UNDER THE FEDERAL CONSTITUTION, CONFLICT WITH FEDERAL PROCUREMENT STATUTES.

The District Court herein further held and found, under its own caption "The Issue of the Supremacy Clause" (190 F. Supp. 645, 654), that the California Milk Stabilization Act was invalid under Article VI, Section 2 of the Constitution of the United States. Claiming error, Amicus refers directly to the lower court's definitive language (190 F. Supp. 645, 657):

> "We conclude, therefore, that even if the Penn Dairies Case[11] has not been in effect overruled by the Public Utilities Case,[12] it is inapplicable here because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the Public Utilities Case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2."

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[11]Referring to *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943).

[12]Referring to *Public Utilities Commission v. United States*, 355 U.S. 534 (1958).

The District Court clearly made this vital finding (that the *Penn Dairies* case was inapplicable) upon two alternative lines of reasoning: (a) that the *Public Utilities* decision had possibly overruled it, or (b) that *Public Utilities* controls because its facts comprising a "prohibition on the Federal Government" are comparable with the facts in the case at bar and distinguishable from the facts in *Penn Dairies*. Amicus respectfully submits that both lines of reasoning are in error.

(a) The decision in *Public Utilities v. United States* did *not* overrule the decision in *Penn Dairies v. Milk Control Commission*. This Court, in *Public Utilities*, was explicit (355 U.S. 534, 543-544):

> "We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e.g. . . . (Citations) . . .; Penn Dairies v. Milk Control Com. 318 U.S. 261, 87 L ed 748, 63 S Ct 617, *can likewise be put to one side*. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id. 318 US at 270." (Emphasis added.)

With the above-quoted language, this Court, in *Public Utilities*, did not overrule *Penn Dairies*, but distinguished its facts. The distinguishing factual element was the absence of a "prohibition on the national government."

(b) There was no "prohibition on the Federal Government" ("national government") in the *Penn Dairies* case. There is none in the facts before the Court in the instant case. *Public Utilities* does not control here, and this Court should again draw the essential distinction.

In the *Public Utilities* case, this Court dealt with a California statute which had recently been amended. In its form prior to amendment, it had *permitted* California common carriers "to transport, free or at reduced rates: . . . property for the United States."[13] As amended in 1955, it permitted this practice *only if expressly permitted by the State's regulatory agency: and then only "to such extent and subject to such conditions as it* (the agency) *may consider just and reasonable."* (Parenthetical interpolation added.)[14] The effect of the amendment was to change a permissive practice to a conditionally permissive practice; to regulate previously unregulated rates; and to require the Federal Government to negotiate and purchase its hauling at State-approved rates, instance by instance.

Carried to this point and no further, the Federal Government—purchasing military hauling in California—was ostensibly placed in the same position as it is when purchasing military milk in California under

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[13]Section 530, California Public Utilities Code as amended, cited in *Public Utilities Commission v. United States*, 355 U.S. 534, 535 (1958).

[14]Section 530, California Public Utilities Code as amended, cited in *Public Utilities Commission v. United States*, 355 U.S. 534, 535 (1958).

the facts at bar. The respective situations, though, can be compared *only in the light of the effect of the respective regulatory statutes.* It immediately appears that, in *Public Utilities,* the *effect* of subjecting the Federal Government's activity—hauling—to State regulation was such as to *prevent or frustrate the activity itself.* Consider these observations, by this Court, in reviewing the *Public Utilities* facts. (355 U.S. 534, 545):

> "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."

The Court further commented, quoting a finding by the court below (*Ibid.,* pages 545-546):

> "(Enforcement) '. . . would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process *would cause delays* as high as thirteen hours in the shipment of one truckload or carload. *In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.*'
>
> "Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, *the shipments will be delayed for Commission action . . .*

> "General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial: 'for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, *we would never win the war.*'" (Emphasis added.)

The factual situation so depicted in *Public Utilities* is a far cry from the Federal Government's position under the California Milk Stabilization Act. In *Public Utilities,* the efficiency of the Federal activity —even the activity itself—was "hampered," "disrupted," "delayed." The effect of the California statute was to frustrate the military mission itself ("We would never win the war"), and it imposed on the United States a clearly insuperable burden. This was a "prohibition on the Federal Government"; it "prohibited" the proper discharge of the Federal Government's function.

Under the California Milk Act, the United States assumes only the burden of price; it is not "hampered," "disrupted," or "delayed." For a comparable situation—one dealing with the purchase of milk, not military hauling—we are perforce referred to the *Penn Dairies* decision, where this Court stated (318 U.S. 257, 270):

> ". . . the state regulation imposes no prohibition on the national government or its officers. *They may purchase milk from whom and at what price they will, without incurring any pen-*

> *alty. . . .* As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price of milk. . . ." (Emphasis added.)

This is the situation under the regulatory milk statute in California in the case at bar. The administration of her Milk Stabilization Act develops a factor in the total cost of discharging the Federal military function. It does not adversely affect the actual discharge of that function.

Federal milk procurement officials "may purchase milk from whom and at what price they will, without incurring any penalty." (*Pacific Coast Dairy v. Department*, 19 C. 2d 818, 830 [1943].)

Pennsylvania did not hamstring the Federal military function with her Milk Control Law in the *Penn Dairies* case. The State of California's Milk Stabilization Act is similarly innocuous. Pennsylvania did not "prohibit" the Federal Government—and California does not. Accordingly, the *Public Utilities* decision does not control, and the District Court erred in applying it to the facts now before this Court.

The action of the court below operated to disturb the delicate balance of dual sovereignty. Dealing with the facts before it, the District Court should best have heeded the admonition of Mr. Chief Justice Stone in the same *Penn Dairies* decision it disregarded. He noted (318 U.S. 261, 275):

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their in-

ternal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication (citing cases) should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

CONCLUSION

Amicus respectfully requests that this Court reiterate its position as stated in *Penn Dairies v. Milk Control Commission,* 318 U.S. 261, declaring that the State of California may constitutionally enforce both the minimum producer pricing and minimum wholesale pricing provisions of its Milk Stabilization Act as to producers and distributors selling fluid milk to the United States; and declaring, further, that California exercises essential jurisdiction over the Federal military enclaves involved in this case. Upon such declarations, the judgments of the District Court herein should be reversed.

Dated, Santa Rosa, California,
September 18, 1962.

Respectfully submitted,
JOSEPH A. RATTIGAN,
Attorney for Petaluma Cooperative Creamery, Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, DIRECTOR OF AGRICULTURE OF THE STATE OF CALIFORNIA, AND STANLEY MOSK, ATTORNEY GENERAL, STATE OF CALIFORNIA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 558–582) is reported at 190 F. Supp. 645.

JURISDICTION

The judgments of the district court were entered on April 17, 1961 (R. 666, 668), and notices of appeal were filed by appellants on April 26, 1961 (R. 669, 671). By order entered in the district court on June 7, 1961, the time for docketing the appeal in this Court was extended to and including July 24, 1961. App. Br., 159. On January 15, 1962, this Court postponed consideration of the question of jurisdiction until the hearing on the merits (R. 878;

368 U.S. 965). The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the district court was correct in holding that California could not constitutionally prohibit vendors of milk from contracting with the United States, at prices other than those prescribed by the California Director of Agriculture, for sales of milk to the United States at the Travis, Castle, and Oakland military installations.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the California statutes dealing with the authority of the California Director of Agriculture to regulate prices for the sale of milk by distributors to the United States, and the penalties for violations, are set forth in Appendix A, *infra*, pp. 95–98. Pertinent provisions of the California statutes transferring exclusive jurisdiction over lands within the State to the United States are also set forth in Appendix A, *infra*, pp. 98–103. Pertinent provisions of the federal statutes and regulations applicable to procurement of milk supplies are set forth in Appendix B and Appendix C, *infra*, pp. 104–114.

STATEMENT

This is a direct appeal from the judgments of a three-judge district court convened in the Northern District of California to hear these two consolidated actions. The district court permanently enjoined the appellants, the Director of Agriculture and the Attory General of the State of California, from enforc-

ing California's minimum milk price regulations with respect to milk or milk products sold to the United States at three military installations located within the territorial limits of California.[1] The court held that the application of the California minimum milk price regulations to the sales in question violated the United States Constitution for two independent reasons: (a) the sales occurred on territories over which the United States had acquired exclusive legislative jurisdiction pursuant to Article I, Section 8, Clause 17; and (b) the State price regulations conflicted with federal procurement regulations which declare a policy of obtaining milk supplies by competitive bidding at the most advantageous price to the United States. The relevant facts are as follows:

1. BACKGROUND

Prior to January 1959, the United States purchased milk supplies at Travis, Castle, and Oakland, by formal advertising, as required by the federal procurement statutes and regulations. For example, at Castle bids for supply contracts were solicited from distributors who had been approved by either the Army or the Air Force, after sanitation inspection, for supplying milk to the armed forces (R. 246, 248). Upon receipt of the bids, it was the duty of the Base Contracting Officer to analyze the bids, recommend the award or rejection of the contract, and, for contracts exceeding $25,000, forward the bids to the appropriate higher authority for approval (R. 248).

[1] Travis Air Force Base (Travis), Castle Air Force Base (Castle), and Oakland Army Terminal (Oakland).

The milk supply contracts at the three installations were awarded on a competitive basis to the lowest responsible bidder, and on terms below the minimum milk prices prescribed by the State Director of Agriculture (R. 244, 794–798, 27–28).

a. *Travis.*—Toward the end of 1958 the State Director of Agriculture notified milk distributors that the State Milk Act and minimum milk price regulations applied to sales of fluid milk made to the United States at Travis (R. 173). This notification was confirmed by a telegram, dated January 16, 1959, declaring that the State had jurisdiction over sales of fluid milk to Travis (R. 175).[1] As a result of this action, subsequent bids for milk supply contracts at Travis were in strict compliance with the price regulations established by the State (R. 795). The resulting added cost to the government amounted to approximately $15,000 a month (R. 795).

Faced with this situation, in which distributors were threatened with court actions if they entered into contracts for the sale of fluid milk to the United States at Travis at terms other than those determined by the State regulatory agency, the United States filed a complaint in the District Court for the Northern District of California, Northern Division, on December 10, 1959, pursuant to the provisions of 28

[1] On September 29, 1959, California instituted a civil action in the state courts against the Milk Producers Association, a cooperative association which had been supplying milk to Travis at prices below the state prescribed minimums (R. 173), seeking civil penalties and an injunction restraining the Association from paying its producer members less than the state wholesale minimum prices (R. 181, 184).

U.S.C. 1331, 1345 (R. 178). The complaint requested the convocation of a three-judge court; stated that Travis is situated on land over which the United States has exclusive jurisdiction; and alleged that as a result of the action taken and threatened by appellants "bids for milk to be sold and delivered to plaintiff at Travis Air Force Base have been submitted on a noncompetitive and uniform basis since November 1958, at the minimum rate set forth in the [State] regulations" (R. 180).

The complaint alleged that the State of California, and the Director of Agriculture and Attorney General thereof, are precluded by the Federal Constitution from regulating prices of milk sales to the United States where the sales and deliveries are made on a federal enclave, such as Travis, which is subject to the exclusive jurisdiction of the United States. It further asserted that the State minimum milk price regulations are unconstitutional and void, as applied to such sales, under the Supremacy Clause, because they place an "unreasonable and unconstitutional burden and impediment upon the exercise by the United States of its constitutional powers under Art. 1, Sec. 8, Cls. 11 through 17; Art. 2, Sec. 2, Cl. 1; and Art. 4, Sec. 3, Cl. 2." These constitutional provisions authorize the establishment and maintenance of the Army, Navy and militia, and the acquisition and exercise of exclusive jurisdiction over federal territories. The complaint sought a judgment declaring, *inter alia*, that the California Milk Act and regulations are unconstitutional and void insofar as they prohibit producers and distributors of milk from

selling and delivering milk to the United States at Travis at rates lower than those established by the State; and enjoining the appellants from making any effort to prohibit such producers, distributors or the United States from negotiating contracts for the sale of milk to the United States at Travis at rates lower than the State-prescribed minimums.

b. *Castle and Oakland.*—In December of 1959 the State Department of Agriculture circulated a letter to milk distributors advising them that the minimum milk price regulations were applicable at all federal installations wherein exclusive jurisdiction has not been ceded to the United States (R. 245, 280). The letter listed but a few of the 635 federal installations, military and otherwise, located within the territorial limits of California (R. 392) as being within exclusive federal jurisdiction, and threatened that the minimum milk price regulations would henceforth be enforced with respect to sales to all other installations. Neither Castle nor Oakland were included on this list of federal enclaves. Also in December 1959, the Bureau of Milk Control wired a distributor that bids for the sale of fluid milk to Castle "must be made at prices not less than the minimum wholesale prices" established for the applicable marketing area (R. 279).

The bids to supply fluid milk to the United States at Castle, received in December 1959, were all at or above the State prescribed minimums (R. 245). These bids were rejected "as not being independently arrived at in open competition" (*ibid.*). A new invitation for bids was thereafter mailed on January 13, 1960, and of the nine bids received, one was below

the State minimum (R. 246). In February 1960, appellants brought an action for an injunction and civil penalties against the successful bidder (R. 194, 744). Similar actions were brought against other distributors who had made sales at prices below those promulgated by the State (R. 750, 769).

Because of the virtual elimination of competition at Castle and the anticipated increased cost of procuring milk as a consequence of the intensified pressure of the appellants, the United States, on March 22, 1960, amended the complaint which it had filed in the District Court for the Northern District of California, Northern Division, to add Count II. (R. 191). Count II alleged that the State minimum milk price regulations were unconstitutional as applied to sales of milk to the United States at Castle because the federal government had acquired exclusive jurisdiction over the lands on which the milk was delivered, and because they placed an unreasonable burden and impediment upon the exercise by the United States of its constitutional powers to raise and maintain an army.

As in the case of Castle, bids for milk supply contracts received at Oakland after appellants' letter of December 1959, *supra*, p. 6, were at or above the minimum prices set by California (R. 28). None of the bids were accepted, and the government's supply contract for the preceding period with the distributor Milk Producer's Association was extended for a three-month period, with an estimated savings to the United States of $30,243.90 for that period (R. 28). On March 30, 1960, the United States commenced a

separate action against the appellants in the United States District Court for the Northern District of California, Southern Division, with respect to milk sold to the United States at Oakland (R. 1, 7). The complaint was substantially identical to the complaint filed regarding contracts for the sale of milk to Travis, discussed *supra*, pp. 4–6.

2. The Proceedings Below

By their answers (R. 183, 156, 197), appellants denied that the United States had satisfied the State statutory requirements for the acquisition by the federal government of exclusive jurisdiction over the subject installations. They further contended that there was no conflict between the State regulations prescribing the minimum prices at which the government could purchase milk for use at Travis, Oakland and Castle, and the federal policy of procuring supplies by competitive bidding. Appellants also urged that the court should "stay further proceedings pending an authoritative determination of doubtful state law by the California courts in actions now pending in such state courts" (R. 185).

On April 14, 1960, the United States filed a motion for summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, on Count I (Travis) of the amended complaint filed in the Northern Division of the court below (R. 168). The motion sought judgment upon the ground that the sales of milk to the United States at Travis are made on land within the exclusive jurisdiction of the United States, and that, by enforcement of the minimum milk price

statute, appellants are "interfering with a Federal function, namely, the purchase of fluid milk and fluid milk products at prices most advantageous to the Government * * *" (R. 169). The motion was supported by affidavits of federal military and civilian personnel, which were generally concerned with the acquisition of jurisdiction over Travis and the effect of the enforcement of the milk price regulations on the federal procurement of milk supplies on a competitive basis.

On the same date, by consent of the parties, the suit with respect to Travis and Castle was ordered transferred from the Northern to the Southern Division of the district court and consolidated with the suit involving Oakland (R. 203). On April 18, 1962, the United States filed a motion for summary judgment with respect to Count II of the amended complaint originally filed in the Northern Division (R. 208). The two consolidated cases, involving all three installations, were then heard on the basis of the affidavits submitted by the parties, the pertinent federal and State constitutional and statutory provisions, and documentary evidence as to the acquisition by the United States of the lands comprising Travis, Castle and Oakland.

3. THE OPINION OF THE DISTRICT COURT

The district court refused to stay the proceedings below pending termination of State court actions brought against distributors who had entered into procurement contracts with the United States. The court ruled that "the question whether the United States

acquired exclusive legislative jurisdiction over the lands comprising the various military reservations under discussion is a federal question arising under Title 28 U.S.C. Sections 1331, 1345. *Mason Co.* v. *Tax Commission*, 302 U.S. 186, 197" (R. 561). It held that it could not abstain from exercising its jurisdiction over this federal question because there was no hazard of unnecessarily resolving difficult and uncertain issues of State law, citing *Allegheny County* v. *Mashuda*, 360 U.S. 185.

At the outset of its opinion, the court below recognized that this Court had already held, in *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, that the United States Constitution prohibited California from applying its minimum milk price regulations to sales consummated on lands over which the United States had acquired exclusive jurisdiction. After an extensive review of the facts and the State statutes relating to the acquisition of exclusive jurisdiction by the federal government, the court found that the lands on which milk was delivered at Travis, Castle and Oakland were under exclusive federal jurisdiction, and, accordingly, immune from State regulation.

The district court also noted that *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, decided the same day as *Pacific Coast Dairies*, had held that there was no conflict between the Pennsylvania Milk Control Law of 1937, which is similar to the California Milk Act, and the federal procurement statutes and regulations then in effect. The court, however, pointed to the fact that the federal procurement statute had been

comprehensively revised since the *Penn Dairies* decision, and that the cornerstone of the present federal procurement policy, as stated in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, in which this Court struck down California's regulation of transportation rates under the Supremacy Clause, is competitive bidding through formal advertising. The district court held that there is no difference between the federal policy of competitive bidding as applied to State regulation of federal procurement of transportation and State regulation of the terms on which the federal government can contract for the procurement of milk.

Having found, moreover, that the California Milk Act, like the statutes involved in the *Public Utilities* case, imposed prohibitions on the federal government, the district court concluded (190 F. Supp. at 657):

> that even if the *Penn Dairies* case has not been in effect overruled by the *Public Utilities* case, it is inapplicable here because the California Milk Stabilization Act "places a prohibition on the Federal Government" within the meaning of the *Public Utilities* case, and, therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2.

The court's judgments in both of the consolidated cases enjoined the appellants from enforcing "against producers or distributors of milk or milk products or against the United States or its purchasing agents, with respect to sales, purchases, or deliveries of milk or milk products at the Oakland Army Terminal [or "at Travis or Castle Air Force Bases"] either the

state minimum producer price, wholesale price, or retail price regulations * * *" (R. 666, 669).

Although these orders appear to apply only to sales made at the three military installations and not to sales made on land subject to State jurisdiction by producers (dairy farmers) to wholesale distributors who later resell to the United States, any possible ambiguity in this regard no longer presents an issue requiring review by this Court. For, after appellants filed their jurisdictional statement in this Court, the federal government reviewed its policy with respect to the applicability of the California milk regulations to sales of milk to be used at military installations. As a result of that review, the United States stated on page 5 of its Memorandum In Response To Jurisdictional Statement that:

> There is no longer any necessity for the Court to consider whether appellants can constitutionally enforce the established California minimum *producer* prices with respect to milk farmers selling to distributors for processing and ultimate resale to the United States. The federal government, while not conceding that California can regulate producer prices, over the objection of the federal government, where the milk is to be resold to the United States, has concluded as a matter of procurement policy not to assert immunity from these minimum prices but to accede to full compliance with those requirements. * * *

The federal government will continue to adhere to this policy with respect to the enforcement of the California minimum producer price regulation of

sales to distributors for resale to federal military installations.[8]

SUMMARY OF ARGUMENT

I

The Court has jurisdiction of this direct appeal under 28 U.S.C. 1253. Direct appeal lies under that section from a suit "required to be heard by a district court of three judges." Thus, the sole question is whether the three-judge court below was properly convened under 28 U.S.C. 2281.

In deciding this question there is no need to consider whether a three-judge court was required to consider the issue of a conflict between federal and State regulatory provisions under the Supremacy Clause. A three-judge court is clearly required, under Section 2281, to adjudicate substantial claims of "unconstitutionality" of State law based upon a direct contravention of constitutional provisions limiting State power or delegating power to the federal government. The complaints in this case satisfied this requirement without regard to the claim of a conflict of State law with federal statutes and regulations, for in addition to that claim, they alleged that the California statutes were "unconstitutional and void" as applied to sales of milk at Castle, Travis and Oakland (a) because regulation of sales on these tracts violates the constitutional grant of

[8] If the Court believes that the outstanding orders of the district court are sufficiently ambiguous as to threaten the application of a contempt sanction if one of the appellants attempts to enforce the State milk regulations against producers selling to distributors on territory subject to State jurisdiction, we suggest that the case be remanded to the district court for a clarifying amendment of its final order.

exclusive federal jurisdiction under Article I, Section 8, Clause 17; and (b) because such regulation burdens the exercise by the United States of its constitutional powers to maintain the armed services, to regulate federal territory, and to carry out other constitutional functions.

II

The State of California cannot enforce its Milk Act with respect to sales consummated on lands subject to exclusive federal jurisdiction. *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294. The issue in this case, therefore, is whether the United States has acquired exclusive jurisdiction over the lands at Travis, Castle, and Oakland on which milk sales are consummated.

Article I, Section 8, Clause 17 of the United States Constitution specifically provides that the federal government shall exercise exclusive legislative jurisdiction over lands purchased by it with the consent of the State in which the lands are located for the erection of forts, arsenals and other needful buildings. This clause has consistently been interpreted to mean that a State's consent to the purchase of land by the United States for one of the enumerated purposes operates to vest the federal government with exclusive jurisdiction over the land. The only legislative powers that the State can exercise with respect to such lands are those which it expressly reserved in granting its consent to the purchase.

The record fully substantiates the findings of the court below that the United States purchased the lands on which sales are concluded at these installa-

tions with the consent of the California legislature, and that it has otherwise complied with the relevant constitutional and statutory requirements for the transfer of exclusive jurisdiction under Article I, Section 8, Clause 17.

Appellants' argument that the United States nevertheless did not acquire exclusive jurisdiction over these tracts because it admittedly did not comply with the requirements of separate statutes providing for the cession of exclusive jurisdiction to the United States is without foundation. The United States can acquire exclusive jurisdiction over lands located in a State either by purchasing the land with the consent of the State (Article I, Section 8, Clause 17, United States Constitution) or by a cession of such jurisdiction by act of the State. California has separate statutes dealing specifically with each of these two methods of relinquishing jurisdiction. In support of its contention that the United States has not obtained exclusive jurisdiction over the tracts in question, California relies upon conditions and reservations which are applicable, by their own terms, only to its statute dealing specifically with a "cession" of jurisdiction and which are neither found in nor applicable to its statutes dealing with the relinquishment of jurisdiction by consent to the federal purchase of land under Article I, Section 8, Clause 17. Since jurisdiction over the tracts in question was obtained pursuant to Article I, Section 8, Clause 17 of the federal constitution, this jurisdiction is unaffected by conditions or reservations applicable only to an alternative method of ceding jurisdiction.

The present price regulations, which California is seeking to enforce with respect to sales of milk on the enclaves here in issue, are not assimilated as federal law because they were adopted subsequent to the acquisition of exclusive federal jurisdiction over the tracts on which the sales are consummated.

III

The Milk Act and distributor price regulations cannot constitutionally be applied to purchases made by the United States from appropriated funds for the additional reason that this State system of price-fixing conflicts with the federal procurement policy of freely contracting on a competitive basis to obtain the lowest overall price for the United States.

In *Public Utilities Commission* v. *United States*, 355 U.S. 534, this Court held that a State system of price regulation similar to that involved here could not be applied to procurement by the United States in view of the federal policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefits of competition among and free bargaining with private sellers of supplies or services. An identical result is required here since the federal statutory and regulatory policy with respect to the purchase of milk does not differ in any significant respect from that determined in the *Public Utilities* case. The conflict between California's price regulations and the federal policy is made clear by the Armed Services Procurement Regulations requiring that milk be purchased at fair and reasonable prices calculated to result in the lowest

ultimate overall cost to the United States, and that all procurement, whether by formal advertising or negotiation, be made on a competitive basis to the maximum practicable extent.

Penn Dairies v. *Milk Control Commission,* 318 U.S. 261, is not controlling here because the decision in that case was predicated upon different procurement statutes and regulations. Between the date of that decision and the holding in the *Public Utilities* case, Congress enacted a comprehensive revision and restatement of the law governing the procurement of supplies and the new statute holds to the time tested method of competitive bidding. Of still greater importance is the fact that the regulations in force at the time of the *Penn Dairies* decision were interpreted by the Court as indicating that State price regulations were applicable to sales to the United States. The present regulations, which are substantially similar to those involved in the *Public Utilities* case, plainly indicate that State price regulations are not applicable and thus provide the fundamental distinction between the *Penn Dairies* case and both *Public Utilities* and the instant case.

IV

Even apart from the effects of the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation. A State may not directly regulate or tax the property, instrumentalities, or activities of the United States. In the present case the State's attempt to

violate the constitutional immunity is plain for the State's command is verbally addressed to a class including the United States and its agents. The rule is the same, however, whether the State's command is addressed to a federal procurement officer or takes the form of a restriction on the contracting powers of all potential sellers of goods or services to the United States, for it is the activities of the United States—including the exercise of its power to contract—which must be free of direct State interference.

This immunity of the transactions of the United States from State regulation or taxation is supported by the prior decisions of this Court as well as by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Justice Bradley's statement in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, that a contract, "is the means employed for carrying into execution the powers of the government" and therefore "is exempt from taxation or other intereference by the State government" has never been rejected by this Court and was indeed repeated with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155.

The reasons requiring immunity for the exercise of federal contracting powers from State regulation of the terms to which a supplier may consent are identical to those which have always justified a federal immunity from State regulation or taxation addressed to the federal government or its agents. First, only unseemly and harassing conflicts could result from the recognition of a State's capacity to

regulate the exercise of powers entrusted to the United States by the Constitution. Here California has frankly asserted the power to dictate the terms in contracts of the United States for the purchase of milk, for regulation of the terms which private parties may put into contracts with the United States *is* regulation of the terms for which the United States may contract.

Second, regulation of the transactions of the United States, no less than regulation of its other activities, is likely to impede the performance of federal functions.

Finally, the prohibition of State taxation addressed to the federal government draws a line which at once protects the United States from any State's attempt to write a check on the federal treasury yet does not grant an unwarranted immunity to State residents who happen to have done business with the United States rather than with some other purchaser of goods or services. The burden of California's price regulation, like that of a forbidden direct tax upon federal property or privileges, cannot fall upon the residents of California and is intended to make use of the federal treasury to increase the return to California's milk dealers.

V

None of appellants' contentions of procedural errors in the district court are grounds for reversal of the decision.

The district court was not required to abstain from deciding the issue of exclusive federal jurisdiction over the tracts at Travis, Castle, and Oakland. The

only constitutional questions involved had long been settled by the Supreme Court. There was no separable issue of State law; for the meaning and effect of a State's "consent" to the federal purchase of land within the meaning of Article I, Section 8, Clause 17, is a federal question. The issue was not one solely and peculiarly of local concern but rather involved the rights and powers of the United States and a problem of federalism particularly appropriate for resolution in the federal courts. Finally, neither the complaint nor the district court's decision broadly threatens the execution of California's regulatory scheme with regard to the great mass of milk sales within the State.

It is even clearer that abstention was not required on the question whether the Milk Act prohibited federal officials from purchasing milk at prices below the State-imposed minimum. This question is of only peripheral importance to any of the three issues on the merits in these proceedings. A State decision that California imposed no such prohibition would neither avoid nor materially alter any of the federal constitutional questions involved herein.

The factual and legal issues involved in the Oakland proceedings were fully and adequately before the district court when it rendered its decision in the consolidated cases involving Travis, Castle, and Oakland. The propriety of the district court's restraint of State court proceedings between different parties is irrelevant to this case in its present posture, for, whether or not issuance of the temporary restraining order was correct, the district court could and did properly proceed to judgment. Therefore this judg-

ment is properly before the Court for review on the merits.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT, WHICH WAS PROPERLY CONVENED

In its order of January 15, 1962 (R. 878) the Court postponed a determination of jurisdiction and directed the parties "to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U.S.C. Sec. 1253; see 28 U.S.C. Sec. 2281". The condition of direct appeal under 28 U.S.C. 1253 is that the suit be one "required * * * to be heard * * * by a district court of three judges". The question thus raised is whether the three-judge court below was properly convened under 28 U.S.C. 2281—that is, whether the government's suit was brought to enjoin the enforcement of a California statute on "the ground of the unconstitutionality of such statute," within the meaning of that section.

1. The "unconstitutionality" of State law for the purpose of 28 U.S.C. 2281 may be asserted in two ways. First, it may be claimed that State law directly contravenes constitutional provisions limiting State power (*e.g.*, Art I, Sec. 10; the Fourteenth Amendment) or delegating power to the federal government (*e.g.*, Art I, Sec. 8). If such a claim is substantial, a three-judge court is required to adjudicate it. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73.

Second, it may be claimed, as in *Kesler* v. *Department of Public Safety*, 369 U.S. 153, that a State law conflicts with federal legislation and hence violates the Constitution through the provision of the Supremacy Clause (Article VI, clause 2) that "the Laws of the United States" as well as "[t]his Constitution", "shall be the supreme Law of the Land." In *Kesler*, speaking for the Court, Mr. Justice Frankfurter held that a three-judge court was required when the alleged conflict between federal and State statutes presented "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction" (369 U.S. at 158). Dissenting, Chief Justice Warren (joined on this point by Mr. Justice Stewart) urged that conflicts of federal and State legislation do not involve a claim of "unconstitutionality" within 28 U.S.C. 2281.

The complaints in the instant cases alleged two grounds of unconstitutionality which brought the cases under the first head of jurisdiction for a three-judge court without the necessity of considering the second.

First, the complaints alleged that the appellants are "precluded by the Federal Constitution from regulating prices of milk sales to the United States where the sales and deliveries are made on an area subject to the exclusive jurisdiction of the United States" (R. 181; see also R. 11, 195). This ground of attack upon the California Milk Act was bottomed directly upon the conflict of that statute with Article 1, Section 8, Clause 17 of the Constitution, delegating to the federal government exclusive jurisdiction over

"all Places purchased by the Consent of the Legislature of the State * * * for the Erection of Forts * * * and other needful Buildings".[4]

As a second ground justifying convocation of the three judge court, the complaints alleged that the minimum milk price regulations were unconstitutional and void because they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions. This ground of attack upon the California Milk Act did not involve any claim of conflict with federal legislation; it relied directly upon the implied constitutional immunity. Furthermore, the claim obviously presented a substantial question, since it involved California's assertion of power to regulate federal officers in the performance of their governmental functions of procuring milk for troop ration and resale at base commissaries at the most advantageous price to the Government. And it also posed as a constitutional issue—besides the conflict of statutes—whether the Milk Act imposes a direct prohibition on the national government or its officers (R. 576).

[4] If California had agreed that its laws could not be applied to a federal enclave and had argued only that the places in question had not been purchased with the consent of the California legislature, then there might be room for dispute as to whether a three-judge court was required to resolve this issue. But California also asserted the right to apply her milk control law to the places in question even if they had been purchased with the consent of the California legislature; and plainly the answer to the question thus posed turns directly and immediately upon an interpretation of the Constitution.

On these grounds, a three-judge court was required, even if the constitutional questions were joined with issues under the Supremacy Clause not involving "unconstitutionality" within the meaning of 28 U.S.C. 2281.[4] This was the holding of *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, where this Court stated (at p. 85):

> Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though unconstitutional grounds of attack are also alleged, we think the case is one that is "*required* by * * * Act of Congress to be heard and determined by a district court of *three* judges." 28 U.S.C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

II

THE DISTRICT COURT CORRECTLY HELD THAT CALIFORNIA CANNOT CONSTITUTIONALLY APPLY ITS MILK ACT TO SALES AT TRAVIS, OAKLAND AND CASTLE BECAUSE THE LANDS ON WHICH MILK SALES ARE CONSUMMATED AT THESE INSTALLATIONS ARE ENCLAVES WITHIN EXCLUSIVE FEDERAL JURISDICTION

The rules controlling and determining the result in this case are firmly established and easily applied to the facts before the Court. The law of exclusive ter-

[4] Once the three-judge court was thus convened, the case would be properly brought here on direct appeal even if the decision below—and the appeal—rested on nonconstitutional grounds. *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U.S. at 80–

ritorial jurisdiction has been carefully applied by this Court for more than a century. It is therefore desirable to begin with a summary of the controlling precedents and the rules they establish, only later turning to their application to the facts of the present case.

A. ARTICLE I, SECTION 8, CLAUSE 17, AND THE PRECEDENTS THEREUNDER

Article 1, Section 8, Clause 17, of the United States Constitution provides that "Congress shall have Power * * *

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

A number of the significant principles that have been developed under this clause are directly relevant to the present case.[6]

81, 84–85 (opinion of Court), 89–90 (dissent); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U.S. 387, 393–394.

[6] The history of this clause of the Constitution is set out in *The Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States*, Part II, pp. 15–27.

Again in *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652, the Court held that:

> It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the State passes, in virtue of the constitutional provision, to the United States, thereby making the jurisdiction of the latter the sole jurisdiction.[9]

This proposition is by now firmly established, subject only to the minor qualification that, since 1940, the

[9] This long-continuing understanding that a State's consent to a federal purchase of land carries with it, by force of the United States Constitution, exclusive federal jurisdiction over the land is neatly summarized by considering one of the two purposes of a Joint Resolution of Congress in 1841, 5 Stat. 468, which is set forth in the appellants' appendix at pp. 170–172. That Congress apparently shared fully the framers' beliefs as to the necessity of federal jurisdiction over federally owned lands, for Paragraph 6 imposed on each Executive Department the duty of attempting to obtain from the States involved jurisdiction over all lands within those States which had formerly been purchased by the United States without the federal government obtaining this jurisdiction (*i.e.*, without the consent of the State legislature to the purchase). To assure exclusive jurisdiction over all future purchases Congress merely provided "[t]hat no public money shall be expended upon any site or land hereafter to be purchased by the United States * * * until * * * the consent of the Legislature of the State in which the land or site may be shall be given to said purchaser." Congress plainly understood that a State's consent to a federal purchase of land carries with it, by virtue of Article I, Section 8, Clause 17, exclusive federal jurisdiction over the land. See 24 Ops. Atty. Gen. 619; 31 Ops. Atty. Gen. 260, 263, 282; 38 Ops. Atty. Gen. 341.

United States has been required by statute to assent to the transfer of jurisdiction over the property purchased. See 40 U.S.C. 255.

2. *The Federal Government may purchase land within a State without the State's consent, but, in such circumstances, it does not obtain the powers of exclusive legislation found in Article I, Section 8, Clause 17 of the Constitution*

The Joint Resolution of 1841, discussed *supra*, p. 28, n. 9, plainly indicated the understanding of Congress that land within a State could be purchased by the federal government without the consent of the State, for otherwise it would have been unnecessary to order the Executive Branch to obtain the consent of the State legislature before making such purchases. Any lingering doubts as to this federal power to purchase without State consent were laid to rest in 1875 by *Kohl* v. *United States*, 91 U.S. 367, where the Court found not only a power to purchase but also a power to condemn land without the consent of the State.[10]

[10] "* * * The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen" (91 U.S. at 371).

The effect of a purchase of land within a State without the State's consent was defined with great clarity in the *Fort Leavenworth* case (114 U.S. at 531. See also *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147):

> * * * Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

For an earlier decision to the same effect, see *United States* v. *Stahl*, 27 Fed. Cas. 1288, No. 16,373 (C.C.D. Kan. 1868).

3. *In situations in which the United States has obtained property within a State in a way or for purposes not falling within Article I, Section 8, Clause 17, the State may cede to the United States legislative jurisdiction over the property*

The United States may thus purchase or condemn land within a State without the State's consent. It may also purchase land, with or without the State's consent, for other purposes than those broad categories listed in Article I, Section 8, Clause 17. (See n. 18, p. 41, *infra*.) In either event, the United States would not obtain exclusive jurisdiction over the purchased land by force of the federal constitution. In the *Fort Leavenworth* case the Court was asked to determine whether there was any way in

which the United States could obtain legislative jurisdiction over land which it owned but had not acquired pursuant to Article I, Section 8, Clause 17. The Court held that, by an act of the State (and without any application of Article I, Section 8, Clause 17), jurisdiction could be ceded to the federal government, saying (114 U.S. at 541, 542):

> * * * It is for the protection and interests of the States, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the States. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. * * *

This holding has never been questioned.

4. *A State may condition its consent to the Federal purchase of land and thereby retain some part of its jurisdiction*

The Court held in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146–149, that a State may condition its consent to the federal purchase of land within its borders upon its retention of some part of its jurisdiction. Although this Court has never passed on the question, it would appear that a State may also

1. *Consent of a State to the purchase of land within its borders by the United States for one of the enumerated purposes confers upon Congress exclusive jurisdiction over the land by operation of the United States Constitution*

A careful reading of Article I, Section 8, Clause 17 makes clear that the United States Constitution itself grants to Congress exclusive legislative jurisdiction over federal enclaves when the terms of Clause 17 are satisfied. Jurisdiction passes by force of the Constitution and not by force of any act of the State. State consent to the purchase of the land is, of course, one of the conditions set forth in Clause 17, but no State statute intended to deal with a cession of jurisdiction is necessary. Once unconditional consent to the purchase of the land is given, jurisdiction over the purchased land passes to the federal government by virtue of Article I, Section 8, Clause 17 of the Federal Constitution.

This reading of the plain wording of the constitutional provision is confirmed by its history. The framers had no doubts about the necessity of exclusive federal jurisdiction over lands purchased, for example, for military purposes. The necessity inhered in the protection of the expenditure of public money and in the effectuation of the purposes of the purchase.[1] As

[1] The purpose of the grant of exclusive jurisdiction over land within a state purchased by the United States and the reason for requiring consent of the state are set forth by Madison in Number 43 of the Federalist Papers. Having discussed the necessity of exclusive federal power over the seat of the federal government, Madison continued (p. 200):

"The necessity of a like authority over forts, magazines, etc.,

this Court later pointed out,* there may even have been doubt as to the power of Congress to purchase land without obtaining exclusive jurisdiction. Therefore the consent of a State to the federal purchase of land was intended to carry with it, by constitutional mandate, the exclusive federal jurisdiction the framers thought necessary over federally owned land.

Finally, the decisions of this Court have laid to rest any doubt as to the self-effectuating force of Article I, Section 8, Clause 17, once a State has consented to the purchase of land within its borders. In *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530, the Court stated this understanding unequivocally, explaining that:

> * * * it was provided that when [the United States] might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. * * *

established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated, by requiring the concurrence of the States concerned, in every such establishment."

* *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530-531.

condition its consent to a federal purchase upon federal compliance with reasonable procedural requirements such as the necessity of filing a plat. See, *Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States*, Part II, pp. 78–80.

5. *The constitutional grant to Congress of exclusive legislative power prevents the exercise of State legislative power over federally purchased land unless the State has conditioned its consent to the purchase on a reservation of such power*

The wording of the Constitution itself hardly left room for any doubt as to this conclusion. Article I, Section 8, Clause 17 provides expressly that Congress' authority over places purchased for, *inter alia*, military purposes with the consent of the State legislature shall be the same as that it exercises over the seat of government. California may no more legislate over land purchased with its consent within its borders than Maryland may legislate over the District of Columbia (*Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 532–533).

> When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever." Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other

> authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys General.

See also, *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141–142; Cf., *Standard Oil Co.* v. *California*, 291 U.S. 242; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 533; *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439.

B. THE APPLICATION OF THESE PRINCIPLES TO CALIFORNIA'S ATTEMPT TO REGULATE MILK PURCHASES AT TRAVIS, CASTLE, AND OAKLAND

In the light of these long-established principles, what this Court must determine in the present case is clear. If the land on which the milk sales and purchases were consummated was within the exclusive legislative jurisdiction of the United States, then California has no more power to regulate the price than Maryland has to set the price of milk that Maryland distributors sell in the District of Columbia. The particular parcels of land involved are within the exclusive jurisdiction of the United States (a) if they were purchased with the consent of the legislature of California;[11] (b) if in granting its consent the State legislature did not impose as a condition the retention of a legislative power which would include the power to regulate milk prices thereon; and (c) if the United States has complied with 40 U.S.C. 255, which has, since 1940, required the United States to accept or as-

[11] There is, and can be, no issue but that the purchase of the tracts presently in issue were purchases for the erection of "Forts, * * * Arsenals * * * and other needful Buildings" as used in Article I, Section 8, Clause 17. See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 143.

sent to the transfer of exclusive jurisdiction. See *Adams* v. *United States*, 319 U.S. 312.

1. *The controlling facts as to each military base.*

a. Travis

Milk contracts for Travis are negotiated by the Base Procurement Officer from Building Number 245 (R. 822).[12] Invitations for bids are prepared and mailed from that building, and received and opened there (*ibid.*). Bids for contracts in excess of $25,000 are originally accepted by the Base Procurement Officer, but his decision must be concurred in by federal agencies not located at Travis (R. 822–823). In all cases, however, notices of acceptance of contracts are mailed from Building 245 (R. 822–823). Milk purchased by the Base Procurement Office is delivered to the following buildings: Numbers 247, 112, 106, 572, 80, T–628, and the 3083d Mess Hall (R. 876, 644). The Project Ownership Map of Travis (formerly Fairfield-Suisun) (R. 819) shows that these buildings are located on the following tracts and were purchased from private individuals named on the Project Ownership Map on the following dates:

Bldg. No.	Located on tract	Date of purchase
245	17B	January 22, 1943 (R. 806, 705, 707).
247	17A	January 22, 1943 (R. 806, 705, 707).
112	16	March 1, 1943 (R. 806, 702).
106	16	March 1, 1943 (R. 806, 702).
572	7	December 4, 1942 (R. 805, 698).
80	18A	January 23, 1943 (R. 806, 711).
T-628	16	March 1, 1943 (R. 806, 702).
3083d Mess Hall	18	February 16, 1943 (R. 805, 714).

[12] The Base Procurement Officer does not purchase milk for non-appropriated-fund activities at Travis (R. 515, 538).

Thus, the lands at Travis on which contracts are negotiated and sales are consummated (see Cal. Civil Code, Sections 1737, 1739(4), (5), 1783) were purchased by the United States between December, 1942, and March, 1943. It is not denied that these lands were purchased for the erection of forts, arsenals, or other needful buildings. Further, at the time of the purchase of these tracts, the California Legislature, by statute, consented to the purchase or condemnation by the United States of any tract of land within the State for the erection of forts, etc. without conditioning this consent upon the reservation of any legislative jurisdiction.[13] Finally, the United States has

[13] Section 34, Political Code, as amended by Statutes of 1939, Chapter 710, p. 2231:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

"The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and

assented to the transfer to it of exclusive jurisdiction over these lands by "blanket" letters of acceptance from the Secretary of War to the Governor of California dated April 16, 1943 (R. 339) and January 3, 1944 (R. 339), and by a letter of March 14, 1944 specifically referring to Fairfield-Suisun (now Travis) (R. 213–222, 216). Having complied with the relevant constitutional and statutory requirements, the United States acquired exclusive jurisdiction over the tracts at Travis on which milk contracts are negotiated and sales are consummated."

b. Castle

Although milk was delivered at Castle on Parcel 12 prior to February 15, 1960, when appellants instituted an action in the California State courts to enforce the Milk Act (R. 642), sales are now consummated on Tract A (R. 247, 642). The milk delivered to Tract

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power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States."

Section 34 was repealed, effective August 4, 1943, and codified to read (Cal. Stats. 1943, Ch. 134, pp. 896, 898):

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

[14] Assuming *arguendo*, that some milk, not contracted for by the Base Procurement Office on Tract 17–B, is being delivered to areas over which the United States has not acquired exclusive legislation, that milk is not within the territorial immunity from State regulation. This, however, would not affect the immunity of sales consummated on tracts over which the United States has acquired exclusive legislation.

A is used by the United States at the troop messes and post commissary located on Parcel 12 (R. 642).

Acquisition of Tract A was authorized originally under the Lanham Act, 42 U.S.C. 1521, by a Directive from the Commissioner of the National Housing Agency, dated July 3, 1942, for the construction of civilian war housing (R. 223; 228–233 (reference at 229 to Merced); 234). Jurisdiction over the project was transferred to the Department of War on September 1, 1942 (R. 223, 235–240; (reference to Merced at 237 and 238)), and the United States first purchased title to Tract A on July 17, 1943.[15]

On the date of purchase (July 17, 1943, or April 6, 1943), California Political Code Section 34, discussed with reference to Travis, *supra*, pp. 35–36, was in effect and operated to give the State's consent to the purchase. The United States assented to the transfer of exclusive jurisdiction to it over Tract A at Castle (then known as Merced) by "blanket" letters of acceptance dated April 16, 1943 (R. 374) and January 3, 1944 (R. 339), and by letter of March 14, 1944, referring to Merced Army Air Field (R. 213–222). Since Tract A was purchased with the consent of the state, it is within exclusive federal jurisdiction and transactions concluded there are immune from State regulation.

[15] Title was purchased from one Phillips by deed dated April 6, 1943 (R. 223, 226). Appellants argued below, however, that the United States did not acquire title under this deed until July 17, 1943, when Phillips himself received a deed from the Federal Farm Mortgage Corporation. (See R. 571; App's Br. 85–86; R. 490–495). For purposes of this litigation, the United States accepts July 17, 1943, as the date of purchase.

c. Oakland

Milk purchased by appellee at Oakland Army Terminal is received on Parcel B–210 (R. 646–647).[16] Parcel B–210 was purchased by the United States on March 2, 1942 (R. 369, 639). At that time, Political Code Section 34, discussed *supra*, gave California's consent to the purchase of lands within the State for the purposes enumerated in Article I, Section 8, Clause 17. The United States accepted jurisdiction over Parcel B–210 by "blanket" letters of assent dated April 16, 1943 (R. 374), January 3, 1944 (R. 339), and by letter dated March 14, 1944 specifically referring to Oakland (R. 213–222, at 219). As our analysis of Travis and Castle demonstrates, these occurrences vested exclusive control over Parcel B–210 in the federal government.

Moreover, on April 21, 1949, the Secretary of the Army again mailed a notice to the Governor of California informing him that the United States accepted jurisdiction over lands at Oakland (R. 372). At this time, Political Code Section 34 had been replaced by Government Code Section 126, enacted in 1946.[17] To comply fully with the requirements of Section 126 as well as those of Section 34, the government, on July 5, 1950, filed an application for public hearing before the State Lands Commission (R. 368). Following the public hearing, on October 5, 1960, the

[16] Appellants argue that milk is also delivered to Parcel A-119, citing R. 647. However, admission 33 does not support the proposition that milk is received at Parcel A-119, but merely that the Officers Club is located there.

[17] Section 126, as it was at all times possibly relevant to the present litigation, is set forth below in Appendix, p. 101.

State Commission adopted a resolution (R. 137–148) finding that the United States had complied with the conditions precedent to the granting of State consent under Section 126, including the statutory requirements that the acquisition "must be for the erection of forts * * * and other needful buildings * * * within the purview of Clause 17 of Section 8 of Article I" (Section 126(a); R. 138); that the "United States must in writing have assented to acceptance of jurisdiction over the lands * * *" (Section 126(c); R. 139); and, that the acquisition was in the interest of the State (R. 140). Accordingly, if exclusive control over Parcel B–210 did not vest in the United States by operation of Section 34 of the Political Code, it clearly was transferred to the United States by virtue of the State's consent under Government Code Section 126.

2. *California's contentions*

With a flurry of largely unrelated arguments appellants attempt to avoid the force of the constitutional mandate that "Congress shall have Power * * *: To exercise exclusive Legislation in all cases * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts * * * and other needful Buildings * * *." We shall deal with each of the arguments in turn.

a. The claim that California's statutes consented only to the Federal purchase of land and not to the cession of exclusive jurisdiction

California argues first that "the California legislature in granting state consent to the federal pur-

chase of land for military purposes * * * did not intend to transfer exclusive jurisdiction to the United States." Appellant's Brief, pp. 89–99. One complete answer to this is that the Constitution does not require that the State legislature consent to a transfer of exclusive jurisdiction before the federal government can acquire such authority; rather, it declares that the United States shall exercise sole authority if, as California did here, the State consents to the *purchase* of the land ("and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State * * *"). This clear distinction, which is developed in detail *supra*, p. 26, was emphasized by the Court in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, 530:

> This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them.

See also, *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 141–142.

Had the framers meant that the State must consent specifically and explicitly to a cession of legislative jurisdiction, they would not have provided that Congress' exclusive jurisdiction depends solely upon the consent of the State to the federal purchase. As the quotation from the Federalist Papers, *supra*, p. 27, n. 7, indicates, the writers of the Constitution believed that a transfer of exclusive legislative jurisdiction was an implicit predicate of a federal purchase of land for one of the enumerated purposes. They therefore limited their protection of the interests of the States to a right to deny consent to the purchase of land by the United States. Any other requirement would have left the protection of the federal investment and purposes in the purchase of land at the mercy of a court's construction of the subjective "intent" of the State legislature.[18]

In any event, the constitutional mandate that exclusive jurisdiction shall be transferred upon a State's uncon-

[18] For this reason appellant's reliance on *Wilson* v. *Cook*, 327 U.S. 474, is badly misplaced. In *Wilson*, the United States did not purchase the lands for the purposes enumerated in Article I, Section 8, Clause 17. Instead, the lands were acquired under a congressional statute authorizing the reservation of forest lands by the federal government, and this federal statute expressly provided that the "[s]tate wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction * * *." 327 U.S. at 486–487. Similarly, the Arkansas "consent" statute in *Wilson* did not consent to the purchase of land for the purposes enumerated in the Constitution, but merely consented to the purchase of forest lands by the United States. The Court, therefore, properly held that Arkansas did not surrender jurisdiction over these lands in the absence of express words to that effect in the statute.

ditional consent to the federal purchase of land for one of the enumerated purposes was plainly contemplated in the passage of the California "consent" statutes. Political Code Section 34, which was in effect at the time of all three purchases, clearly indicates that the State was consenting to a transfer of exclusive jurisdiction pursuant to Article I, Section 8, Clause 17. Thus, the statute makes an express reference to land acquisitions for the purposes set forth in that clause of the Constitution—*i.e.*, "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of *erecting forts, magazines, arsenals, dockyards, and other needful buildings*" (emphasis added). It then goes on to make specific, limited reservations of jurisdiction—to tax and serve process. The express reservation of certain limited powers is indicative of the understanding that all other jurisdiction would pass to the federal government. This obvious construction was recently adopted by the Attorney General of California who likewise concluded that Political Code Section 34 is a consent to the transfer of exclusive jurisdiction to the federal government. 23 Ops. A.G. Cal. 14.[19]

That the California legislature was aware of the jurisdictional consequences of its grant of consent to a federal purchase is made even clearer when one

[19] Appellants attempt to distinguish this Opinion on the ground that it was not concerned with the extent and nature of federal authority over Fort Ord, the military installation there-involved. The question presented, however, was whether Fort Ord was subject to exclusive federal authority, and to resolve that issue the Opinion had to and did determine whether Political Code Section 34 was a consent to the transfer of jurisdiction to the United States.

considers the wording of Government Code, Section 126 (App., pp. 101–103), the statute which in 1946 replaced Section 34 of the Political Code and which California contends is applicable to the land on which the purchases at Oakland were consummated. This consent statute specifically refers to Article I, Section 8, Clause 17 of the Constitution in defining the permissible purposes of the federal purchase; it requires the United States to assent to the acceptance of jurisdiction over the land involved; and it specifically reserves those aspects of its jurisdiction which it is unwilling to have pass to the United States pursuant to the federal constitution. The reference to the jurisdiction-conferring clause of the Constitution, the requirement of federal assent to an acceptance of jurisdiction, and the careful reservations of some aspects of State jurisdiction all show that this statute was intended to authorize a transfer of jurisdiction.

Finally, there would have been no reason for California to pass its consent-to-purchase statutes unless it was recognized that consent was necessary for the transfer of exclusive jurisdiction under Article I, Section 8, Clause 17. Appellants' attempt to explain the passage and reenactment of these "consent" statutes as necessary to *any* purchase of land under the Congressional Resolution of 1841 (5 Stat. 468) and its successor provisions—even without a transfer of jurisdiction—is totally ineffectual. As pointed out *supra*, pp. 28–29, n. 9, these provisions were plainly intended to require a transfer of jurisdiction, not to require a State's consent to a purchase even when jurisdiction did not pass to the United States. And

many years before the passage of the California consent statutes applicable to this case, this Court had plainly declared that the federal government has power to purchase or condemn land without the consent of the States. *Kohl* v. *United States*, 91 U.S. 367 (1875); see also *United States* v. *Stahl*, 27 Fed. Cas. 1288, No. 16,373 (C.C.D. Kan., 1868).

b. The claim that the power of "exclusive legislation" granted to Congress by Article I, Section 8, Clause 17 does not preclude the exercise of State legislative power.

California contends that the power of "exclusive legislation" over certain lands granted to Congress by the Constitution does not in itself prohibit the State from also legislating for these lands. Appellants' Brief, pp. 99–107, 133–139. As we have pointed out above, *supra*, pp. 32–33, this contention is in direct conflict with the words and purpose of the constitutional provision and has always been rejected by the Court. See also, *United States* v. *Bevans*, 3 Wheat. 336, 388; *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652. It was flatly rejected by this Court in *Pacific Coast Dairy* v. *Dept. of Agriculture*, 318 U.S. 285, a case involving the very State legislation here in issue.[20]

[20] "When the Federal Government has acquired exclusive legislative jurisdiction over an area, by any of the three methods of acquiring such jurisdiction, it is clear that the State in which the area is located is without authority to legislate for the area or to enforce any of its laws within the area. All the powers of government with respect to the area are vested in the United States." *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, p. 169.

In *Pacific Coast Dairy, supra*, California attempted to regulate milk sales on federal enclaves indirectly by proscribing, in an amendment to its Milk Act, the handling of milk by distributors within the State for prospective sale at a point outside the jurisdiction of the State at less than the State-determined minimum prices. Its theory, approved by the California Supreme Court, *Pacific Coast Dairy v. Department of Agriculture*, 19 Cal. 2d 818, 123 P. 2d 442, was that a State has power to regulate matters within its jurisdiction, even though it will thereby materially influence transactions beyond its jurisdiction. The case involved sales consummated on Moffet Field, an area over which the United States had acquired exclusive jurisdiction by purchasing the lands with the consent of the State. 318 U.S. at 293.

This Court held that "sales consummated within the enclave cannot be regulated by the California [Milk Act]" because of the constitutional grant of "exclusive Legislation" respecting lands purchased by the United States with the consent of the State. 318 U.S. at 294. The Court flatly rejected California's argument that "a state is not disenabled from policing its own concerns, by the mere fact that its regulations may beget effects on those living beyond its borders" on the ground that "it is without application here, because of the authority granted the federal government over Moffet Field". 318 U.S. at 295.

The conclusion must be the same in the present case. Certainly no distinction is suggested by California's allegation that the milk purchased on a federal enclave at Castle is used on lands subject to State jurisdiction. (Appellants' Brief, p. 88.) Whether or not the land where this milk is resold or consumed is subject to State juridiction, the use of the milk by federal officials cannot be regulated by California. Therefore both the sale and the use of the milk at Castle, even on California's allegations, are as much a matter of exclusive federal concern as was true in *Pacific Coast Dairy, supra.*

c. The claim that California conditioned its consent to the purchase of land either on the filing of a plat or on the retention of concurrent legislative jurisdiction.

Appellants argue that certain State statutes "ceding" jurisdiction over land ceded, conveyed, or granted to the United States imposed conditions on the California statutes granting consent to the purchase of land in California by the United States.

(i) In particular, they contend that the tracts involved at Travis and Castle are not under exclusive federal jurisdiction, although purchased with the consent of the State legislature, because the United States admittedly did not comply with the requirement of a State "cession" statute that the State will not cede exclusive jurisdiction over lands "ceded or conveyed" to the United States unless the United States files a description and map of the lands with the county recorder. Appellants' Brief, pp. 107–116. As we have noted, above, *supra*, pp. 31–32, a State may in fact con-

dition its grant of consent to the federal purchase of land within its borders. However, it is clear beyond cavil that the California statutes requiring the filing of a plat were never intended to apply to lands purchased by the United States with the consent of the State legislature.

The United States can acquire exclusive jurisdiction over lands located in a State by purchasing the land with the consent of the State for one of the purposes specified in Article I, Section 8, Clause 17 of the United States Constitution. This is not, however, the only way in which the United States may obtain such jurisdiction. The State may cede jurisdiction to the United States over lands which the federal government has condemned or purchased without consent of the State or which have been obtained for some other purpose (*e.g.*, forest use) or in some other way (*e.g.*, by lease) than those specified in the Constitution. This latter method, cession of jurisdiction by act of the State, was first recognized in 1885 in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525. See, also, *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. California has had, since 1897, separate statutes dealing with each of these methods by which the United States may acquire exclusive jurisdiction over land within a State's borders. The requirement of filing a plat is found only in the statutes dealing with a cession of jurisdiction by act of the State—not in the statutes concerned with granting consent to a federal purchase of land with its attendant consequences under Article I of the United States Constitution. And

the only tracts of land involved in this case were acquired by Federal purchase with the consent of California pursuant to Article I, Section 8, Clause 17.

California adopted Political Code Section 34, in which the State consented to the purchase of lands by the United States for forts, etc., and, hence, effected a transfer of exclusive jurisdiction over lands so purchased, in 1872. In 1897, after the decision in *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U.S. 525, recognizing the validity of a cession of jurisdiction, it enacted its first cession statute (Chapter 56)[21] as a supplementary measure to enable the United States to obtain legislative jurisdiction over lands acquired without the consent of the State or otherwise without complying with the jurisdiction-conferring provisions of Article I, Section 8, Clause 17. From this history the Attorney General of California concluded (23 Ops. A.G. Cal. 14, 17):

> It is significant that Chapter 56 of the California Statutes of 1897 was enacted subsequent

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[21] Chapter 56, Cal. Stats. 1897, p. 51:

"Section 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes: *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, no incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands."

> to *Fort Leavenworth Railroad Co. v. Lowe*, *supra*, which was decided in 1885. It is reasonable to assume that the Legislature of this State, recognizing the second method by which jurisdiction may be transferred from the state to the federal government, enacted Chapter 56 of the California Statutes of 1897 to provide for this alternative method of transferring jurisdiction.

It is difficult, indeed, to disagree with his conclusion, for Chapter 56 nowhere refers to Political Code Section 34 or lands purchased by the United States with the consent of the State, but, by its own terms, limits its application to lands which "may hereafter be ceded or conveyed" to the United States. Moreover, the 1897 statute, Chapter 56, included, for the field of its application, a reservation of State jurisdiction to serve process which, being almost identical to that already found in the consent statute, could only have been thought necessary if, as is apparent from their wording, the two statutes applied to two quite different methods of relinquishing jurisdiction. Finally, the two statutes plainly had different fields of application. Consent was granted to federal purchases for any of the purposes listed in Article I, Section 8, Clause 17, of the Constitution ("erecting forts, magazines, arsenals, dockyards, and other needful buildings"). Jurisdiction was ceded, by act of the State, only if the land had been ceded or conveyed to the United States for military purposes.

Any possible ambiguity as to the divergent purposes of the two statutes was eliminated in 1939 when California amended Section 34 of the Political Code. See *supra*, p. 35, n. 13 for the text of the amended Section 34, applicable at the time of the purchase of Travis, Oakland and Castle. Paragraph one of the amended section consented to the purchase of lands within the State by the United States, subject to certain express reservations. Paragraph two provided that the same reservations provided for in paragraph one "in the case of the purchase or condemnation by the United State of any tract of land within this State shall * * * also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States * * *" (Chapter 710, Cal. Stats. 1939, p. 2231) The Legislature of California there carefully distinguished between a relinquishment of jurisdiction by consent to a federal purchase of land and a cession of jurisdiction by act of the State. The latter method of ceding jurisdiction was provided for, by State statute, only in Chapter 56, the "cession" statute of 1897. It is therefore entirely clear that the function of the "cession" statute was to provide a method of ceding jurisdiction where land had *not* been purchased by the federal government in such a way as to bring Article I, Section 8, Clause 17 into effect. And the plot-filing requirement of the "cession" statute was, like the grant of jurisdiction it modified, only applicable where jurisdiction had *not* passed to the United States pursuant to Article I of the federal Constitution.

The cession and consent statutes were reenacted and

codified in 1943 after the purchase of the tracts involved in the present case.[22] Again the two different modes of transferring exclusive jurisdiction were treated separately by the State legislature. One, the consent-to-purchase method (Section 111), applied (a) to lands purchased by the United States, (b) for any of the purposes named in Article I, Section 8, Clause 17 of the federal constitution; and it specifically conditioned consent on a reservation of that jurisdiction which was to be retained by the State. The other,

[22]Government Code, Section 111, as set forth in California Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

* * * * * * *

Government Code, Section 113, as set forth in California Statutes 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation."

Government Code, Section 114, as set forth in California Statutes 1943, Chapter 134, pages 898-899:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated."

the "cession" method (Sections 113, 114), applied (a) to lands ceded or conveyed to the United States, (b) for military or defense purposes; and it included a reservation of jurisdiction identical to that already present in the "consent-to-purchase" statutes and required the filing of a plat. It is plain on the face of the statutes that the statutory requirement of filing a plat applied only to the "cession" method of transferring jurisdiction and not to the consent-to-purchase method.

The conclusion is inescapable that California's "cession" statutes were never intended to limit or modify the State's "consent-to-purchase" statutes, but were meant to add a new method of relinquishing jurisdiction to the federal government. Therefore, in order to acquire exclusive jurisdiction by the separate purchase-with-consent method, the United States did not have to comply with the filing provisions of the cession statute. The California Attorney General has previously recognized this clear distinction in 23 Ops. A.G. Cal. 14. The same conclusion was reached in the *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part I, p. 28.

(ii) Although it appears clear that the United States had obtained exclusive jurisdiction over the relevant land at Oakland long before California modified its "consent-to-purchase" law in 1946 (Govt. Code Section 126) (*supra*, pp. 38–39), California also contends at length that the 1946 statute, which reserved the application of all conditions on consent imposed by other laws, made applicable to the purchase of land

at Oakland the provisions of Government Code, Section 113, quoted *supra*, n. 22. Appellant's Brief pp. 139–148. Appellant's position is erroneous even on its contrary-to-fact assumption. Section 113 reserved "the administration of the criminal law of the State" only from that jurisdiction which it otherwise "cedes" to the United States. As we have shown, *supra*, pp. 50–52, Section 133 is a "cession" statute and its provisions, by its own terms, the history of its enactment, and prior decisions of the Attorney General of California, only apply to lands conveyed to the United States over which jurisdiction has been "ceded" by act of the State. They do not apply to lands, such as are involved at Oakland, which were purchased with the consent of the State and are within the express mandate of Article 1, Section 8, Clause 17 of the Constitution.

d. The claim that California's Milk Act was assimilated as federal law on Oakland, Castle, and Travis.

Appellants argue alternatively that the Milk Act and the administratively determined minimum price regulations were assimilated as federal law on Oakland, Castle and Travis because these installations were acquired after the enactment of the Milk Act, citing *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294. Appellant's Brief, pp. 120–124.

In making this contention, appellants do not rely upon the Assimilative Crimes Act of 1948, 62 Stat. 686, 18 U.S.C. (1952 ed.) 13 which makes applicable appropriate provisions of State law in force at the time of the act or omission. Reliance on this federal

statute would be of no avail to State officials, for, even if a State price regulation were assimilated as federal law, federal enforcement officials, and not the appellants, would be responsible for prosecuting violations of the federal statute on the enclaves. See *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 392–393.

Speaking of an earlier Assimilative Crimes Act, the Court said (*Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 266):

> Prosecutions under that section, however, are not to enforce the laws of the state, territory or district, but to enforce the federal law, the details of which, instead of being recited, are adopted by reference.

For this reason the *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* concluded, as to the present Assimilative Crimes Act, that (Part I, p. 17) "Law enforcement must, of course, be supplied by the Federal Government since, the State law being inapplicable within the enclave, local policemen and other law-enforcement agencies do not have authority nor do the State courts have criminal jurisdiction over offenses committed within the reservation."[23]

Appellants place their exclusive reliance upon the rule—originally of international law—assimilating for a ceded territory the civil laws of a former sovereign.

[23] Moreover, "No reported judicial decision appears to exist upholding the effectiveness, under the Assimilative Crimes Act, of a primarily regulatory statute containing criminal provisions." *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, p. 138.

The rule was first made applicable to State law in federal enclaves in *Chicago, Rock Island & Pacific Railway* v. *McGlinn*, 114 U.S. 542. This Court has, however, repeatedly held that because a State cannot legislate with respect to a federal enclave unless it specifically reserved that right when it consented to the purchase of the lands by the United States, only the State law as it existed at the time of the acquisition is assimilated, and not subsequent amendments to that law. *Arlington Hotel Co.* v. *Fant*, 278 U.S. 439; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99–101, *Pacific Coast Dairy* v. *Department of Agriculture*, 318 U.S. 285, 294; see *Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States*, Part II, pp. 158–159. Since there is no issue in the present case as to the applicability of State law as it existed at the time the United States obtained exclusive jurisdiction of the tracts in question—California is seeking to enforce its current regulatory scheme and not the price regulations as set out at the time of purchase of the land—the question whether California's earlier Milk Act was assimilated is not involved in the present case.[24]

[24] In any event, State law can have no effect in a federal enclave if it conflicts with federal policy. *Pacific Coast Dairy* v. *Department of Agriculture*, *supra*; *Murray* v. *Gerrick & Co.*, 291 U.S. 315, 318–320; *Chicago, Rock Island, & Pacific Railway Co.* v. *McGlinn*, 114 U.S. 542, 546. As we shall develop below, it is our position that the Milk Act is in direct conflict with the federal policy of purchasing on a competitive basis—insofar as sales directly to the government are concerned—and, as applied to federal enclaves, invades an area of regulation which has already been occupied by the Armed Services Procurement Act and the regulations thereunder.

e. The claim that property acquired by the War Department was subject to the restrictions the Lanham Act imposed upon property acquired by the National Housing Agency

Finally, with respect to Castle, appellants point to the fact that the United States originally secured *possession* of Tract A in 1942 to construct emergency civilian war housing under the Lanham Act, 42 U.S.C. 1521, *et seq.* Appellants' Brief pp. 116–120. Section 10 of the Lanham Act provided that the acquisition of real property by the Administrator of the National Housing Agency would not deprive any State of civil or criminal jurisdiction over property acquired pursuant to that Act. Jurisdiction over Tract A, however, was transferred to the War Department in 1942,[23] and when title to the property was acquired in 1943, the acquisition was not by the Administrator of the National Housing Agency but by the War Department.

Appellants insist that the provision of Section 10 of the Lanham Act, preventing the United States from acquiring exclusive jurisdiction over property obtained under that Act, permanently "attached" to Tract A so that, even though it was subsequently purchased by the War Department with the consent

[23] This transfer of jurisdiction was made pursuant to Section 4 of the Lanham Act, 56 Stat. 12:

"*Provided, further*, That the Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of this Act as may be considered to be permanently useful to the Army or Navy."

of California and for the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution, the United States did not acquire exclusive jurisdiction over the tract. It is clear that when jurisdiction over Tract A was permanently transferred to the War Department for use as an integral part of the national defense system, the restrictions and provisions of the Lanham Act governing the use of the land were no longer applicable.[26] The court below correctly disposed of this argument too (R. 572):

> We are of the opinion, however, that after the transfer of Tract A from the National Housing Administrator to the War Department, pursuant to 42 U.S.C. Section 1524, for military purposes, statutory provisions of the Lanham Act, including Section 10, became inapplicable to the land. The War Department would not be subject to statutory provisions pertinent only to lands held by the National Housing Agency for Lanham Act purposes. Upon its acquisition of Tract A for its own military purposes the War Department held it subject only to statutes pertinent to its own powers and purposes.

[26] Appellant's interpretation (Br. 116) of the Opinion of the Army Corps of Engineers (R. 380–381) as expressing the view that California exercises jurisdiction over Parcel A by virtue of the restrictions in the Lanham Act is inaccurate. That opinion recognized that the Judge Advocate General had determined that "upon transfer of such lands to the Department of the Army, the limitations in Section 10 do not apply." The Opinion concluded, erroneously, that "jurisdiction over this area has not been accepted for the United States." As we have shown, *supra*, p. 37, the United States did consent to a transfer of exclusive jurisdiction over Tract A to the Federal government.

III

THE CALIFORNIA PRICE-FIXING STATUTES ARE INCONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS GOVERNING PROCUREMENT OF MILK PRODUCTS AND CANNOT BE CONSTITUTIONALLY APPLIED TO CONTRACTS OF THE UNITED STATES FOR MILK SUPPLIES

If, as we contend, the district court was correct in its holding as to the existence and effect of exclusive federal jurisdiction on the relevant tracts, at Travis, Castle, and Oakland, then California is without power to regulate any sales taking place on these tracts regardless of who is the buyer. Even if the district court were wrong in its basic holding, we contend and the district court found that California can not regulate the sale of milk—on or off these installations—to officials of the military departments when the purchase price comes from appropriated funds and when, therefore, the federal policy embodied in the federal procurement statutes and regulations is in effect. Regulation of the price the government must pay from appropriated funds for milk conflicts with the federal procurement policy of free bargaining in a competitive context and therefore must fail under the Supremacy Clause.[27]

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[27] On this aspect of the case we shall restrict our argument, as the district court restricted its holding, to purchases made for direct use by the federal government (*e.g.*, mess hall consumption) and to purchases for resale at commissaries. See 190 F. Supp. 645. Only purchases for these purposes have been shown on the present record to be made from appropriated funds.

A. THIS COURT'S DECISION IN PUBLIC UTILITIES COMMISSION OF CALIFORNIA V. UNITED STATES, 355 U.S. 534, CONTROLS THE PRESENT CASE

In *Public Utilities Commission of California v. United States*, 355 U.S. 534, 544, this Court held that the conflict between a federal policy of free negotiation for advantageous rates and a State policy of regulation of minimum rates was "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" and that therefore State rate regulation could not be applied to federal procurement of transportation services. It is our belief that an identical conflict exists in the present case and must be resolved in the same way.

Here, as in the *Public Utilities* case, California has established detailed procedures for the regulation of the price to be charged to and paid by the United States. The California Milk Act authorizes the Director of Agriculture to prescribe minimum wholesale prices and minimum retail prices. Cal. Agric. Code 4351, 4352. Minimum wholesale prices are defined as including the "prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises * * *." Cal. Agric. Code, Section 4352, App. 95. Minimum retail prices mean prices at which fluid milk is sold by distributors and retail stores to consumers. Cal. Agric. Code, Section 4353, App. 96. The Code provides that "No distributor shall sell to any retail store, restaurant, confectionery, or other place for consumption on or off the premises, or to any consumer" and, in the fol-

lowing clause, that none of these "shall purchase from any distributor * * * at less than the prices as established by the director. * * *" Cal. Agric. Code, Section 4361, App. 96. Criminal and civil penalties are provided for the violation of these provisions. Cal. Agric. Code, Section 4410, App. 97.

Pursuant to delegated authority, the Director of Agriculture has promulgated minimum prices at which distributors can sell to retail stores, restaurants, confectioneries, and other places for consumption on the premises, for the marketing areas encompassing Travis, Castle and Oakland. And as the record in this case shows, these regulations were enforced with respect to sales to the United States, with the result that competition for government supply contracts was eliminated and almost all bids were at the State imposed minimum prices. It is fair to conclude that this State price regulation is at least as rigorous as that involved in the *Public Utilities* case.[28]

Under the holding of *Public Utilities Commission of California* v. *United States, supra,* State price regulation, such as this, cannot be applied to the United States in the face of a federal procurement

[28] In the *Public Utilities* case, California required that applicable transportation rates be filed by each common carrier and that no carrier "shall charge, demand, collect, or receive a different compensation for the transportation of persons or property * * * than the applicable rates * * * specified in its schedules filed. * * *" 355 U.S. at 538. Although, by special provision, the California commission could "permit common carriers to transport property *at reduced rates for the United States*" (355 U.S. at 535), the Court found that the State regulatory scheme unmistakably asserted the State's power to set rates in government transportation contracts.

policy which provides in detail for a method of purchase intended to assure that the United States obtains the benefit of competition among and free bargaining with private sellers of goods or services. The crux of the "conflict" question in the present case is, therefore, whether the federal statutory and regulatory policy with regard to the procurement of milk differs in any significant respect from that determined in the *Public Utilities* case with respect to the procurement of transportation services. A comparison of the statutes and regulations relating to milk and transportation reveals that there is no such difference in federal policy which could justify a different result in the present case.

In the *Public Utilities Commission* case this Court ruled that the interlocking federal statutes and regulations governing procurement of transportation services were intended to be, not merely a set of recommended procedures for federal officials for dealing within the context of State customs and laws, but a pervasive and uniform procedural framework for the federal purchase of goods and services regardless of conflicting State laws. The Court found that in the controlling statutes "Congress has provided a comprehensive policy governing procurement" (*id.* at 540) with competitive bidding the general rule and negotiated purchase or contract the exception which was to be available in several enumerated situations. In the more specific regulations "promulgated to carry out these statutory provisions" (*id.* at 542) in the field of transportation the Court noted three indications that the federal procurement procedures were

intended to provide an exclusive framework for the procurement of transportation without regard to State law: (1) provision for the determination by federal officers of the reasonableness of current rates and, "when appropriate, for negotiation of adjusted or modified rates" (*id.* at 542); (2) declarations that the *least costly* adequate means of transportation will be chosen; and (3) stipulations requiring negotiation for lower or more equitable rates whenever currently effective rates were determined to be unreasonable or excessive.

From these statutes and regulations the Court concluded that the federal procurement policy was one of free contracting designed to secure for the United States those benefits of lower cost and higher quality which the government might be able to obtain by negotiation or other forms of bargaining.

The statutes in effect at the time of the *Public Utilities* case are still the basic provisions for all procurement of supplies and services by the armed services and, as we shall show, the underlying regulations involved here are directed to the same end—procurement at the lowest overall cost to the government. See 70A Stat. 127–133, 10 U.S.C. 2301–2314. The statutes require that contracts will be placed by competitive bidding, in which event the award is to be granted "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered." 10 U.S.C. 2305(c), App. B, p. 105. The only exception to this rule is that procurement may also be carried out by negotiation without advertising in certain specified situations including, among others, where it is impracticable to ob-

tain competition, where bid prices are determined to be unreasonable or not to have been reached independently in open competition,[29] where the purchase is for property for authorized resale, and where the purchase is for perishable subsistence supplies, 10 U.S.C. 2304(a) (10), (15); (8), (9), App. B, p. 104; see *Public Utilities Commision of California* v. *United States, supra,* 355 U.S. at 540–541 and n. 3.

The regulations in the *Public Utilities Commission* case differ from those involved here in that they were concerned solely with transportation. They differ also in that, while the regulations considered in the *Public Utilities* case were viewed as emphasizing free bargaining by procurement officers, the regulations applicable to milk procurement emphasize not only the freedom of procurement officers to bargain for acceptable prices, but also the competitive context which must be brought to bear on any purchase of milk with federal funds, whether the purchase is made by negotiation or by advertising for bids. Except for this explicit emphasis on use of the forces of competition—a factor which makes it even clearer that the federal policy is incompatible with State regulation of the

[29] As stated in the Senate Report on the Armed Services Procurement Act of 1947, the purpose of this provision was "to break collusive bidding, follow-the-leader pricing, rotated low bids, identical bids requiring drawing of lots, uniform estimating systems, refusal to classify the Government as other than a retail buyer regardless of the quantity purchased, and similar practices." S. Rep. 571, 80th Cong., 1st Sess., p. 4. The present military procurement statute is a recodification, without substantial change, of the Armed Services Procurement Act of 1947. See, S. Rep. 2484, 80th Cong., 2d Sess., pp. 19, 20–21.

prices—there is no difference in either the scope or the fundamental aim of the regulations found in the *Public Utilities* case and those applicable here.

The Armed Services Procurement Regulations applicable to the procurement of milk with appropriated funds speak with unusual clarity of the purpose to obtain the lowest overall price through the use of techniques designed to secure for the United States the benefits of competition among vendors. "It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost of the Government." ASPR 3-801.1, App. C, p. 109. That method of procurement shall be used "which will be most advantageous to the Government—price, quality, and other factors considered."[30] ASPR 1-301, App. C, p. 106. "Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent * * *." *Ibid.* Whichever method is used, "competitive proposals * * * shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as * * * to obtain for the Government the most advantageous contract—price,

[30] Because of the positively expressed Congressional intent that all procurement shall be by competitive bidding, the Air Force policy is to use advertising procedures whenever possible, notwithstanding the authority to negotiate for perishable subsistence supplies in 10 U.S.C. 2304(c)(9). Air Force Procurement Regulation 2-102, App. C, pp. 112-114.

quality, and other factors considered." ASPR 1.302.2, App. C, p. 106.

If procurement is effected by advertising for bids, the contract is to be awarded "to the lowest responsible bidder." ASPR 1–301, App. C, p. 106. Moreover, "[t]he fact that a procurement is to be negotiated," rather than handled by advertising for bids, "does not relax the requirements for competition." See Army Procurement Procedure, 3–101, App. C, p. 110. Even in the case of negotiation, price quotations are to be obtained from enough suppliers "to assure full and free competition * * * to the end that procurement will be made to the best advantage of the Government * * *." ASPR 3–101, App. C, p. 107. Twenty separate considerations are to go into the selection of a supplier in cases of negotiated procurement. The first of these, as in the case of procurement by advertising for bids, is a "comparison of prices quoted." *Ibid.* Finally, the service regulations make entirely clear that when procurement by negotiation is undertaken the contracting officers have complete discretion to "bargain with any number of interested suppliers" and to conduct "separate negotiations * * * with any source of supply" in any way and to any extent thought necessary "to the end that maximum pricing benefits from all negotiated transactions may be realized." See, Army Procurement Procedure, Paragraph 3–101(b), App. C, p. 110.

There is no room for doubt that the federal procurement policy is bottomed upon a belief in the necessity of "full and free competition" and free

bargaining in order that the federal government may obtain the services and supplies it needs at the lowest over-all cost to the United States. Here, moreover, as in the *Public Utilities* case, "It seems clear that these regulations * * * sanction the policy of negotiating rates * * * and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U.S. at 542–543. Indeed, the regulations go beyond authorizing procurement officers to bargain freely for lower rates. The regulations specify that such negotiations or, wherever possible, advertising for bids shall be conducted in a context of active competition to obtain for the United States the most advantageous contract.

The conflict between California's system of price regulation and the federal procurement system is clear. The federal scheme directs procurement officers to purchase at the lowest ultimate over-all cost to the government; it requires that purchases be made by competitive bidding to the maximum practicable extent; and it establishes comprehensive procedures governing the details of procurement of supplies by either negotiation or formal advertising to assure that procurement officers bring the effect of competition to bear on the other contracting party. The California statute, as experience has shown, effectively eliminates competition. It forces federal officers to procure supplies not at the lowest cost to the United States, but at a price determined by a State administrator on the basis of factors not specified in the federal procurement law. And where the

supply contract is negotiated because "it is impracticable to obtain competition," it is the State agency, and not the federal officer, who determines the price term of the contract. In sum, the conflict in the instant case is fully as acute as that presented in *Public Utilities Commission* v. *United States*, 355 U.S. 534. Here, as in that case, "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" is "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." 355 U.S. at 544.[31]

B. APPELLANTS' CONTENTIONS

Two arguments advanced by appellants against the force of the *Public Utilities* decision deserve separate consideration.

(1) First, appellants contend that the "conflict" issue in the present case has already been determined by the Court in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. However, *Penn Dairies* involved the consideration of federal statutes and reg-

[31] Indeed, in one significant sense the conflict between federal and state regulation of milk procurement is even clearer here than was the conflict in the *Public Utilities* case, for the scheme of federal regulation is far more comprehensive. The United States has undertaken to regulate not only the method of determining the price at which it will purchase milk, but also the quality of the product it purchases. Thus, bids are only mailed to distributors which have been approved, after sanitation inspection, by the Army or Air Force (R. 246, 248), and the standard procurement contracts provide for the testing of milk supplies and periodical inspection of the distributor's plants. (R. 41, 80, 115, 124, 244, 269, 270). No room is left for the play of State law even in the determination of the quality of milk sold to the United States.

ulations different from those applicable either in this case or in *Public Utilities Commission of California* v. *United States*. 355 U.S. 534. It was therefore held not to control the *Public Utilities* case, and it cannot control this litigation.

In *Penn Dairies*, the Court analyzed the early procurement statutes and regulations there applicable, and found no conflict with Pennsylvania's laws fixing the price of milk sold to the government. Since that decision Congress has passed what the House of Representatives report called "a comprehensive revision and restatement of the law governing the procurement of supplies and services." H. Rep. 109, 80th Cong., 1st Sess., p. 6. See also S. Rep. 571, 80th Cong., 1st Sess., p. 2. The new statute "holds to the time-tested method of competitive bidding," *ibid.*, and provides that procurement will be made on terms most advantageous to the United States.

Of greater importance is the fact that the regulations in force at the time of the *Penn Dairies* decision manifested a procurement policy directly opposed to that which infuses the present regulations.[32] The earlier regulations stated that supplies might be purchased on the open market where it was "impracticable to secure competition." They then expressly ruled that it was "impracticable to secure competition" where the price was fixed by State authority. The Court regarded this as "a clear indication that state price regulations were not thought to be inappli-

[32] These regulations have, of course, the force of law. *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542-543; *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

cable to sales under Army contracts." 318 U.S. at 277. The regulations further specified that federal contracting officers should not require suppliers to comply with local price regulations *before it was judicially determined whether such regulations were applicable to government contracts*, a requirement so limited by its own terms that the Court viewed it as manifesting a "hands off" policy respecting minimum milk price laws. 318 U.S. at 276–277.

The present regulations make no such allowances, but instead command unqualifiedly that purchases must be made on a competitive basis. While the federal statute does authorize negotiation where it is impracticable to secure competition (10 U.S.C. 2304(a)(10)), the regulations make it clear that any such negotiation is to be conducted on a competitive basis to the maximum practicable extent, and in accordance with the expressed federal policy of purchasing at the lowest ultimate over-all cost to the government, ASPR 3-101, 3-801, App. C, pp. 107–110. The differing policies manifested by these two sets of statutes and regulations provide the fundamental distinction between the *Penn Dairies* case and this Court's later decision in *Public Utilities Commission of California, supra*. Since the policy of the federal statute and regulations involved here is substantially identical to that involved in *Public Utilities Commission*, the result in that case is controlling here.

2. Appellants' second contention is that, whatever the federal policy may be as to purchases for mess-hall consumption, in the case of milk purchases for resale at commissaries there is no federal policy

favoring negotiation or competition in order to obtain the lowest possible prices. Appellants rely, in support of this argument: (a) on appropriation acts indicating that base commissaries are considered unnecessary where private stores selling similar products at a reasonable price are located within a manageable distance and requiring that commissaries sell at a price sufficient to cover the cost of the goods sold; and (b) on federal statutes and regulations exempting purchases for resale from the requirements of procurement by advertising for bids.

The United States recognizes that the considerations which must be evaluated in determining the federal policy with respect to purchases for resale in commissaries are, in some material respects, different from those involved in purchases of services or supplies for direct use or consumption by the federal government. But, while these differences make the issue of a conflict between federal and State policies a more difficult one when purchases for commissaries are involved, they do not, in our view, require a different result.

Purchases by the United States for resale at post commissaries are made from appropriated funds (R. 515, 516, 538–539; see 75 Stat. 377) by federal procurement officers acting under the directives of the federal procurement law.[33] And neither the statutes nor the regulations exempt purchases for commissary

[33] There can be no dispute that commissaries are integral parts of the Defense Department, that they share in the fulfillment of the duties entrusted to that Department, and that they partake of whatever immunities it may have under the Constitution and federal statutes. See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481.

se from the policies of free contracting in a competitive setting which they enunciate.

It is true that the statute provides that, where an item is purchased for resale, it *may* be procured by negotiation rather than by formal advertising (10 U.S.C. 2304(a)(8)) and that this provision was inserted because purchases for commissaries are generally made by brand name rather than by specification. S. Rep. 571, 80th Cong., 1st Sess., p. 7. This however, does not support an inference that commissary purchases are never governed by the federal policy of purchasing at the lowest ultimate over-all cost to the United States. To the contrary, the statutory exception to formal advertising is merely permissive—the agency head "may" negotiate—and the armed forces are therefore free to purchase, by formal advertising, from the responsible bidder whose bid "will be the most advantageous to the United States." 10 U.S.C. 2305(c). That negotiation shall *not* be used unless the facts and circumstances making advertised bidding impractical are clear and convincing is a mandate of the federal procurement policy. See, Air Force Procurement Regulations, Paragraph 2-102, App. C, p. 112. Thus milk products have been purchased on a competitive-bid basis at each of the three installations presently in issue, and there can be no question that this use of free competition to obtain favorable terms is expressly authorized by federal law. Indeed, the issue would be no different if milk contracts were customarily negotiated, for the regulations provide, without exception, that the federal policy of purchasing in a competitive context at the

lowest cost to the United States is applicable to all procurement which is effectuated by negotiation. ASPR 1-301, 3-801.1, App. C, pp. 106, 109-110.

The conflict between these federal statutes and regulations authorizing the use of competitive bidding and negotiation to obtain the lowest over-all price for milk intended for resale at commissaries and the application of California's Milk Act to commissary purchases is, in all material respects, the same as that involved in the *Public Utilities* case. Accordingly, the State act must give way unless the promulgation of these federal regulations was unauthorized. We do not believe that serious doubt is cast upon the validity of these regulations by the provisions of recent authorization acts declaring that commissaries must reimburse the service appropriation for any appropriated funds used to purchase operating supplies and that no appropriation shall be used to assist commissaries if the items sold can be obtained elsewhere at a reasonable distance and a reasonable price. See, *e.g.*, 75 Stat. 377.

That commissaries are to be run on a self-sufficient basis so that the cost of products sold is met by the price charged establishes, it is true, that any savings in the cost of milk will accrue to the commissary purchasers and not to the federal Treasury. It does not, however, establish that there was no authority to make the general procurement regulations applicable to commissary sales in order to realize savings for military-connected personnel. Indeed, the applicability of the federal regulations to commissary sales is all but required by federal statute. Congress itself

had authorized the payment for commissary supplies from appropriated funds. See, *e.g.*, 75 Stat. 377. And the federal statutes dealing with military procurement and declaring the federal policies of free competition and free bargaining are expressly made applicable to all purchases "for which payment is to be made from appropriated funds." 10 U.S.C. § 2303.

Finally, the fact the Congress sees no justification for paying for commissaries where the same items can be purchased at a reasonable price within a reasonable distance bears, at best, tangentially upon the desirability of allowing those commissaries which satisfy the statutory criteria of economic isolation to enjoy and pass on to their customers the benefits of open competition and free negotiation. A clearer statement of Congressional policy than that which has been given in the appropriations acts should be necessary to invalidate regulations embodying the substance of a statutory policy which is made expressly applicable to *all* purchases "for which payment is to be made with appropriated funds." 10 U.S.C. 2303.

IV

TO APPLY THE CALIFORNIA PRICE REGULATION TO U.S. MILK CONTRACTS OF THE UNITED STATES WOULD DIRECTLY, AND THEREFORE UNCONSTITUTIONALLY, REGULATE AND BURDEN THE OPERATIONS OF THE FEDERAL GOVERNMENT

The complaints allege that, quite apart from the federal statutes and regulations, the California price regulation is unconstitutional because it violates the United States' inherent constitutional immunity from

State regulation (R. 11, 181). In analyzing this claim, which we earnestly renew, it is essential to observe the exact limits of the constitutional question. The United States indubitably has some degree of sovereign immunity from both State taxation and State regulation as "an unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Congress may define its operative limits, either by waiving any part of the immunity that would otherwise exist (see *Mayo* v *United States*, 319 U.S. 441, 448), or by ousting State-imposed burdens that unduly hamper the effectuation of federal policies (*Federal Land Bank* v. *Kiowa County*, 368 U.S. 146, 149 and cases cited). When neither Congress nor its authorized delegates in the executive branch have spoken, as we now assume to be the case, it is for the Court to determine what rule shall prevail until Congress expresses a policy. The task is not unlike that of determining how far a State may regulate or tax interstate commerce in the silence of Congress.

Two rules for dealing with this situation have come to be settled:

First, a State may not directly regulate or tax the property, instrumentalities or activities of the United States. *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Mayo* v. *United States*, 319 U.S. 441; see *Penn Dairies* v. *Milk Control Comm.*, 318 U.S. 261.

Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the

federal government imposes an increased economic burden upon the United States is not alone enough to give the contractor immunity from the taxation or regulation. *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Alabama* v. *King & Boozer*, 314 U.S. 1; *United States* v. *City of Detroit*, 355 U.S. 466; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94.

While the boundary dividing the spheres of application of each of these rules may not be clear in every case, one subsidiary proposition is both easily applied and firmly established. A State may neither address a command to, nor impose a tax upon, the agents and officers of the United States when they are acting in the course of their constitutional powers. This constitutional mandate has been plainly disregarded in the present case, for the California statutes are, as applied by the State to military purchases, a direct regulation addressed to the federal government as a purchaser and retailer.

The minimum distributor prices are fixed by the Director of Agriculture, and for the United States to purchase milk from distributors at less than the prices established by the Director is a violation of Cal. Agric. Code, Section 4361.

> No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and *no* retail store, restaurant, confectionery or other *place for consumption on or off the premises, shall purchase* from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director

under the provisions of this article * * *." [Emphasis added.]

The prohibition of purchases by a "place for consumption on or off the premises" must include purchases by the United States at the military installations here involved, for the prohibition (in the same sentence) of sales to a "place for consumption on or off the premises" is relied upon by California to prohibit distributors from selling to the United States at prices less than the State imposed minimums. (See R. 152, 751–753, 791–793.)[34] A violation of Section 4361, or of any other provision of the Act or any order of the Director establishing minimum wholesale prices, is a misdemeanor and is also punishable by civil fine. Cal. Agric. Code 4410.

Thus, here, as in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 538, "If a United States officer were to [contract] with a [distributor] for 'reduced rates' * * * he could be thrown

[34] Moreover, the Director of Agriculture is without authority to prescribe minimum prices with respect to sales between distributors and the United States unless the United States is included within the meaning of the phrase "any * * * place for consumption on or off the premises." The Director is authorized to prescribe minimum wholesale (distributor) prices by Section 4350, and Section 4352 limits this authority to the "prices at which fluid milk * * * shall be sold by distributors to retail stores including the prices at which fluid milk * * * shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises * * *."

Pacific Coast Dairy v. *Department of Agriculture*, 19 Cal. 2d 818, 830, 123 P. 2d 442, 449, reversed, 318 U.S. 285, which neither considered nor even mentioned the prohibitions on buyers in what is now Section 4361, cannot be considered an authoritative holding that the Milk Act's prohibitions are inapplicable against federal officers.

into the county jail." This circumstance distinguishes *Penn Dairies* v. *Milk Control Commission*, 318 U.S. 261, where, as the case came before the Court, the State regulation imposed no penalty or prohibition on the federal government or its officers; they, Mr. Chief Justice Stone said, "may purchase milk from whom and at what price they will, without incurring any penalty" (318 U.S. at 270).[35]

We do not stand upon that ground alone. Defining the boundary line between direct regulation or taxation of the United States and taxation or regulation of one doing business with the United States involves recognition of the fact that a State may attempt to tax or regulate the activities of the federal government without verbally addressing its commands to a class including the United States or its agents. It is the activities of the United States and not merely its agents that must be free from State interference. Included among those activities is the federal government's exercise of its powers to contract. Accordingly, we submit that a State may not regulate the terms of a transaction by which the United States obtains services or supplies.[36]

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[35] Appellants argue that the Court should disregard the plain meaning and effect of Section 4361—that is, making it unlawful for a federal officer to purchase milk below the State minimum prices—because California has not yet made any attempt to enforce the penal provisions of the act against federal officers. A similar disclaimer of an intent to disregard the penal provisions of the Public Utilities Code was rejected by the Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 536, 538, 550.

[36] In *United States and Olin Mathieson Chemical Corp.* v. *Department of Revenue of the State of Illinois*, No. 235, this

This proposition may be fitted into the basic principles stated above in either of two ways. One formulation would recognize that in determining whether an attempted State regulation of the terms of a contract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of the sellers of goods or services. In determining what is "direct," in defining the immunity, this Court "goes beyond the bare face of the statute to consider all relevant circumstances." *United States* v. *City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which contractors may enter with the United States is, inevitably and directly, to regulate the government itself.

Alternatively, one might reserve the first principle—banning direct taxation and regulation of the United States, its property and activities—for cases in which the legislation is addressed *in haec verba* to the United States or a class of which it is a member. In this event, that principle and the rule denying immunity where the State statute is not addressed to the United States and imposes only an indirect burden upon the United States do not form a dichotomy dividing the universe; they leave room for a third class of cases in which the State statute, although not for-

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Term, Jurisdictional Statement filed July, 1962, challenging the constitutionality of an Illinois tax upon sales made to the United States, we deal with the parallel tax aspects of this question.

mally addressed to the United States or its agents, nevertheless imposes more than the kind of indirect economic burden with which the latter rule is concerned. The present case would then fall within the intermediate area, to be governed by a separate rule exempting the contracts of the United States from *direct* regulation without regard to the form of words.

In either event, the immunity is supported both by the prior decisions of this Court and by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Under one approach these are reasons for bringing the case within the phrase "direct regulation of the United States," for the rules should cover the cases within its reasons. Under the other approach, they support the recognition of an immunity from direct regulation of the terms of government contracts in addition to the immunity from direct regulatory or tax laws addressed to the United States.

A. THE PRECEDENTS

In *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, Mr. Justice Bradley drew the governing distinction and "plainly stated the rule that government contracts are not subject to taxation or regulation by a State (emphasis added):

> The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the govern-

> ment has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and *the contract* alone, and not the contractor, *is exempt from taxation or other interference by the State government.*

This passage was quoted by the Court with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. See also the separate opinion of Mr. Justice Frankfurter in *City of Detroit* v. *Murray Corp.*, 335 U.S. 489, 495, 498.

The doctrine was squarely applied in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, where this Court held that an Arkansas sales tax could not constitutionally be applied to sales to the federal government because the government's sovereign immunity had not been waived. The Arkansas law imposed an excise tax of two percent upon the gross receipts of all sales; the tax was to be paid to the State by the seller who, in turn, was required to collect it from the purchaser. Arkansas attempted to collect the tax upon a sale of tractors to be used in constructing a naval depot for the United States under a cost-plus-fixed-fee contract. Arkansas asserted that the sale was to the contractor and was therefore taxable

regardless of the incidence of the ultimate economic burden. Cf. *Alabama* v. *King & Boozer*, 314 U.S. 1. The United States and the contractor replied that the purchaser under this contract was the United States. The Court, agreeing that the United States was the purchaser, pointed out that its decisions "consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 123), and held that the application of the tax to the sale to the United States violated its constitutional immunity from State taxation even though the seller was the only formal addressee of the statutory command. The dissenting justices concluded that the contractor was the real purchaser but did not dispute the basic proposition that sovereign immunity exempts the United States from "taxes levied on the * * * purchases of the Government itself" (*ibid.*).

There is no ground that would benefit appellants for distinguishing between a State law imposing a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect. If there be a difference, the regulation is the more obnoxious because it frequently restricts the manner in which the governmental activities can be conducted. See pp. 83–86 below.

B. THE REASONS

The three dominant reasons for the immunity of the United States from direct State regulation or taxation of its officers or property, also support the proposition that a State may not directly regulate the terms of its contracts.

(1) It is inherent in the concept of sovereignty that neither the United States nor a State should assert the right to regulate or tax the activities of the other while confined to its constitutional orbit. The alternative is unseemly and harassing conflict. In the present case California has frankly asserted the power to dictate the price term which the United States may negotiate in its contracts with any California distributor for the purchase of milk. It is a matter of plain common sense that regulation of California's milk distributors in their dealings with the United States is regulation of the United States in its dealings with the distributors. A price term is no different from any other term in this regard. Regulation of the quantity of supplies needed by the federal government that may be delivered by local vendors *is* regulation of the supplies it can purchase. Regulation of the price to be charged by the distributor *is* regulation of the compensation to be paid by the purchaser. Indeed, regulation of the terms which private persons may put into contracts with the United States *is* regulation of the terms which the United States may put into contracts with these private persons. A contract is an integral relationship between two persons; it makes no difference whether its terms be prescribed from one side or the other.[37]

[37] It is, of course, true that in the present case (unlike its companion, *United States* v. *Georgia Public Service Commission*, No. 81, this Term) the theoretical possibility of the United States purchasing at unregulated prices from suppliers in other States remains open. However, in the case of a perishable commodity that theoretical possibility is rarely a realistic one.

These truths are expressly recognized in the California statute which prohibits federal officers, as purchasers, from contracting for lower or different prices than those specified in the milk price regulations (see *supra*, pp. 75–77), but the omission of all express references to purchasers would not reduce the unseemly inter-governmental conflict.

(2) A second reason for the immunity of the federal government from direct regulation of the activities of its officers and employees is the danger that, wholly aside from any increased economic burden, the application of such State laws would obstruct the United States in the attainment of constitutional purposes. The Court has stated in the broadest terms that the federal government's dealings with independent contractors are immune from State laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U.S. at 157, 161), "handicap efforts to carry out the plans of the United States" (*James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104), or "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U.S.

Moreover, the heart of the constitutional infirmity in State regulation of the terms of federal contracts is present whether the State regulates all or merely most of any particular group of federal transactions. While the unconstitutionality of the State regulation is particularly clear where the government's freedom to negotiate for a particular term in contracts for supplies or services is completely circumscribed, the State cannot justify regulation of federal transactions by suggesting that the United States may alter its course of dealing in a burdensome way to avoid State regulation.

111, 115). See *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. The danger of these consequences which is inherent in any State regulation addressed to federal officials in the course of performance of their authorized duties justifies a blanket immunity of these officials from such regulation. It equally justifies a grant of immunity from State regulation of the transactions of the United States.

The degree of actual interference will vary from instance to instance. However, the controlling principle leaves no room for distinctions between different governmental functions, or for judicial appraisal of the degree of obstruction. Whenever the regulation would directly impinge upon the employees, instrumentalities or activities of the United States, there is immunity in the absence of a Congressional waiver. Whenever the incidence of the statute is upon the contractor's activities incident to performance of the government contract as distinguished from its terms—regulation of the wages he pays his employees or his safety equipment, for example—there is no immunity in the absence of Congressional action no matter how heavy the resulting indirect economic burden may be. This test does not resolve all the difficulties in dealing with intergovernmental immunities, but it achieves sound relationships in most cases and furnishes a workable test.

It is hardly necessary to add that the risk of obstruction of the activities of the federal government is the same whether the State attempts to regulate the terms of its contracts in language which speaks of the promises and performance of the government

(here the purchaser), or of the private contractor (here the distributor). If a State cannot constitutionally forbid the United States from constructing a dam without securing the State's approval of the plans and specifications (*Arizona* v. *California*, 283 U.S. 423, 451–452), it cannot defeat the sovereign exemption by forbidding any contractor to work upon any dam the plans and specifications for which have not been approved.

There are three answers to any suggestion that price and rate regulation must be distinguished from other regulatory State legislation because they place only economic burdens upon the United States. The first answer is that this is not always true, as the opinion of the Court convincingly demonstrates in *Public Utilities Commission of California* v. *United States*, *supra*. We have also shown in our brief in that case how the rate regulation in issue in *United States* v. *Georgia Public Service Comm.*, No. 81, this Term, would interfere with the government's methods of shipping household goods of its personnel. Second, the thrust of the entire effort to establish workable rules in the field of intergovernmental immunities has been to get away from the appraisal of degrees of burden and to avoid such distinctions as those between a price, a price schedule which affects the kind of service available, and the other terms of performance. Third, the rule that those doing business with the United States cannot claim immunity from non-discriminatory taxation or regulation merely because of a resulting economic burden upon the United States does not mean there is no immunity whenever the only

practical impact is economic. Obviously, the practical impact of many non-discriminatory taxes, such as the real property tax is only economic, yet this Court's decisions "consistently prohibit taxes levied on the property *or purchases of the* Government itself." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 123. (Emphasis added.) One aim of the rule is "to keep the contracting governments from putting their hands in each others' pockets." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation,* p. 128.

(3) This brings us to the third reason for the basic distinction between direct taxation and regulation, and mere economic burdens. As the activities and responsibilities of the State and federal governments expanded, it became apparent that the doctrines of intergovernmental immunity exemplified by such decisions as *Gillespie* v. *Oklahoma,* 257 U.S. 501; *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, and *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, were not only closing off important sources of State revenue but were creating an ever-growing and likely-to-become odious class of persons who were not required to pay a normal share of the cost of public services because they had some connection with the government. The subsequent decisions holding that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (*United States* v. *City of Detroit,* 355 U.S. 466, 469) and cutting the implied immunity back to exemption from taxes on the government itself, or

its property, instrumentalities or purchases (*e.g.*, *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466; *Alabama* v. *King & Boozer*, 314 U.S. 1), seem to us to reflect a desire to avoid those evils rather than utter indifference to whether the State and federal government put their hands into each other's pockets.

When the tax or regulation is levied upon the contractor as distinguished from the United States, its property or its contracts, the incidence of the resulting economic burden is problematical. No one could be sure whether the real beneficiary of the older immunity was the government or the employee or contractor. And while there are some cases in which one can be sure that a tax on the contractor will be borne by the United States, dollar for dollar (*e.g.*, *Alabama* v. *King & Boozer*, 314 U.S. 1),[38] in the generality of cases the distribution of the burden is indeterminable; all or part might be absorbed or spread out over other undertakings. In contrast, where the tax is upon the United States, its property or contracts, and must be paid by the federal government, recognition of the immunity gives no special privilege to private citizens and the government pays the tax, dollar for dollar. The State which attempts to collect such a tax is attempting to raise revenue from the federal government.

Direct price regulation has the same consequence. California's price regulation fixes the exact sum which

[38] In such cases it is significant that the burden has been voluntarily assumed by the United States in its contract, not imposed upon the federal government by the State.

must come out of the federal treasury, just like a tax upon federal property (*Van Brocklin* v. *Tennessee*, 117 U.S. 151) or upon the privilege of making shipments (see *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155). The very aim would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to California's distributors.

We believe that these considerations dictate a holding that the United States is immune from State regulation of the terms of its contracts whether this regulation is addressed to federal officials or to those who deal with them. It will be said that this conclusion is contrary to *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. Although the cases are distinguishable (see *supra*, p. 77), we are in fact challenging the soundness of the approach of the Court in the *Penn Dairies* case. A differentiation between the terms on which the government can buy and the conditions on which contractors may sell to the United States cannot be realistically maintained. The Court was sharply divided, five to three, and Mr. Justice Murphy, who was in the majority, appears to have been more influenced by the need for a wholesome supply of milk than by any rationale of intergovernmental immunities having general application. In the present case, as we have shown, regulation of the prices distributors may charge is direct regulation of the terms for which the federal government may negotiate; and therefore the sovereign is constitutionally immune.

We are not unmindful that the assertion of the implied constitutional exemption may sometimes im-

pair a system of State regulation or have untoward social or economic consequences. For example, after the lower court's decision in this case, the Executive Branch reviewed the underlying questions of policy and decided not to assert whatever immunity might apply to producer prices. Such problems ought never to be overlooked, but where the State regulation bears directly upon the United States, its activities or its contracts, it should be left to the policy-making branches of the government to determine whether to waive the sovereign immunity otherwise implied in the Constitution.

V

NONE OF APPELLANTS' CONTENTIONS OF PROCEDURAL ERRORS IN THE DISTRICT COURT ARE GROUNDS FOR REVERSAL OF THE DECISION BELOW

A. ABSTENTION

Appellants argue that the district court should have abstained from exercising jurisdiction over the federal questions presented in this case in order to allow the State courts first to construe the doubtful portions of the California statutes relating to the relinquishment of legislative jurisdiction and to determine whether the California Milk Act in fact imposes a prohibition upon the federal government. As the three-judge district court ruled, however, abstention was not required on either ground.

The doctrine of abstention forms a limited exception to the otherwise mandatory jurisdiction of a federal district court. Although the occasions for its use cannot be neatly characterized, several generalizations

may safely be ventured. (1) This Court has not authorized—much less required—a federal trial court to abstain from exercising its statutory jurisdiction unless one of two situations is present: (a) the necessity of deciding a troublesome constitutional issue hinges upon a preliminary and difficult question of State law; or (b) although no difficult constitutional issue is presented, the federal court is asked to decide a matter of peculiarly local concern or a matter within the particular competence of a local tribunal. (2) Abstention is most appropriate where the questions to be referred to a State tribunal can be considered in relative isolation from any remaining federal questions which are properly matters for the federal court. (3) The significant benefits of abstention are the prevention of premature decision of difficult and far-reaching constitutional questions; the desirability of consistent decisions in new areas of State law which can only be authoritatively shaped by State courts; the desirability of State decision of matters of only remote federal concern and of unusual local concern; the avoidance of federal decisions unnecessarily disrupting State regulatory schemes which could be saved by State court construction in light of constitutional doubts.

These criteria make clear that abstention was not required on the question of exclusive federal power over the tracts at Travis, Castle, and Oakland. No new and troublesome questions of constitutional law were presented by this issue. As we have pointed out, the only constitutional doctrines involved are long-settled by decisions of this Court. Nor was there a

separable issue of State law which could be referred to the State courts while reserving the federal questions for the federal court. Whether the State has "consented" to the federal purchase of land within the meaning of Article I, Section 8, Clause 17, is a question of federal law involving, unavoidably, the construction of the United States Constitution. See, *Mason Co.* v. *Tax Comm.*, 302 U.S. 186. This is plainly illustrated in the present case where the appellants' principle contention is that Article I, Section 8, Clause 17, requires not merely consent to the purchase of land (which California's "consent-to-purchase" statutes gave without substantial reservations) but also consent to a transfer of jurisdiction. The only issue on which federal recourse to the expertness of the State courts would, even arguably, be desirable—the relation of the State's "cession" statutes to its "consent-to-purchase" statutes—is one which would properly be subject to federal review, which has already been resolved by an opinion of the State attorney general, and which, in light of the legislative history, does not present a doubtful issue of statutory interpretation. (See, *supra*, pp. 46–53.)

The issue of transfer of jurisdiction is not one of solely and peculiarly local concern or one within the unusual competence of a local tribunal. The question involves the rights and powers of the United States government and presents a problem of federalism which is particularly appropriate for resolution in the federal courts. If any body of courts have unusual competence in dealing with the interpretation and effect of transfers of legislative jurisdiction, it is the

federal courts and not the local tribunals. Finally, resolution of the question of legislative jurisdiction by the federal district court does not threaten unnecessary interference with a State regulatory scheme. The question and the court's order relevant to this issue involve only a sharply defined and very limited area of State regulation—the applicability of its regulatory statutes to transactions consummated on federal enclaves. And no narrowing construction by a State court could have avoided the necessity of deciding the essentially federal questions as to the existence and effect of exclusive federal jurisdiction over the tracts at Travis, Castle, and Oakland.

It is even clearer that abstention was not required on the question whether California's statutes directly prohibit the United States and its officials from purchasing milk at prices lower than the minimum price schedule set by California. For, as we have shown above, the present case in no sense turns on this question. The possibility of California's enforcement of its Milk Act prohibitions against federal officers was entirely irrelevant to the issue of exclusive jurisdiction; was of only marginal relevance to the question of a conflict between the federal procurement policy and State regulation; and was relevant, but far from crucial, to proper consideration of the issue of the inherent constitutional immunity of the United States from State regulation of the terms of federal contracts. A State decision that the California penalties were inapplicable to federal procurement officials would neither avoid the necessity of, nor materially facilitate, the decision of any of the federal

constitutional issues in this case. An exercise of federal jurisdiction has never been stayed in these circumstances.

B. APPELLANTS' OTHER CLAIMS OF PROCEDURAL ERROR

The appellants' remaining objections to the procedures followed in the district court need only short discussion. Although, technically, the district court's final decision as to the applicability of California's Milk Act to purchases at Oakland was made at the preliminary-injunction stage, the issues presented and resolved were fully treated by both parties and were substantially identical to those carefully considered in the consolidated action involving Travis and Castle. Appellants have not suggested, either in the district court or in this Court, any issue of fact or law which could not be properly decided on the basis of the documents and arguments already before the district court in the two consolidated actions.

Finally, the propriety of the district court's temporary restraint of further proceedings against milk distributors in the State courts in the Oakland proceedings is only an issue in the present case if the case is to be reversed for other reasons and remanded to the district court for further proceedings. Whether or not the temporary restraining order was proper, the proceedings between different parties involved in the present case would properly have continued in the federal district court. *Stanton* v. *Embrey*, 93 U.S. 548. Had the temporary restraining order been vacated on appeal immediately after its issuance, the district court would still have been free to

proceed to judgment as it did. It is this judgment which is now under review by the court. Even if it is now held to have been error to issue the restraining order, the district court's judgment must stand if that court had jurisdiction and was correct in its decision on the merits.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted.

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APPENDIX A

California Statutes

The California Agricultural Code provides in pertinent part:

> 4350. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale and minimum retail prices for fluid milk, or fluid cream, or both, as hereinafter set forth, and to enforce the provisions of this article.
>
> * * * * *
>
> 4352. Minimum wholesale prices, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor. Minimum wholesale prices, as used herein, includes prices at which fluid milk or fluid cream, or both, shall be sold by distributors to other distributors, other than in bulk, which prices may vary from the minimum prices established for sales by distributors to other wholesale customers and which prices shall be known as "subdistributor prices." A subdistributor price shall be established for each marketing area and when fluid milk or fluid cream, or both, is purchased, other than in bulk, by one

distributor from another distributor for sale in a marketing area other than the marketing area where purchased the price paid shall not be less than the minimum subdistributor price for the marketing area in which the fluid milk or fluid cream, or both, is ultimately sold.

4353. Minimum retail prices, as used herein, shall mean minimum prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

* * * * *

4361. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article. The use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, or any retail store, restaurant, confectionery or other place for consumption on or off the premises buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, is prohibited whether such method, device or transaction applies directly to fluid milk, fluid cream or either or applies to or is used in connection with the sale or handling of any commodity, product or article. Prohibited methods, devices or transactions shall include, but not be limited to, any one or more of the following: discounts, rebates, free services, advertising allowances, leases of re-

frigeration or other equipment, gifts, or payments, allowances or credits made or given for, or in connection with, the return of containers or other property, unless such payment, allowance or credit is a repayment of a deposit or charge, in excess of the price established by the director under the provisions of this article, paid by a wholesale customer, or by a consumer, for the return of such containers or other property.

A distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises shall be considered to have violated the provisions of this section if it engages in such violation directly or through an agent, employee, or subsidiary or affiliated company or corporation. For purposes of this section subsidiary or affiliated company or corporation includes, but is not limited to, companies or corporations controlled by the distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises, directly or indirectly through ownership of issued capital stock or otherwise.

* * * * *

4410. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4240, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of this chapter or of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream or any rule or regulation duly adopted and promulgated by the director under Section 4240 shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

Section 34, California Political Code, enacted 1872:

The legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dock-yards and other needful buildings, upon the express condition that all civil process issued from the Courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made.

California Statutes of 1897, Chapter 56, page 51:

SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State

now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the same are situated; and *provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

SEC. 2. This Act shall take effect immediately.

California Statutes of 1891, Chapter 181, page 262:

SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.

SEC. 2. This Act shall take effect immediately.

Section 34, Political Code, as amended by California Statutes of 1939, Chapter 710, page 2231:

The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be

served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract of land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States.

Government Code, Section 111, as set forth in California Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article.

Government Code, Section 113, as set forth in California Statutes 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United

States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation.

Government Code, Section 111, as set forth in California Statutes of 1943, Chapter 134, page 898:

The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated.

Government Code, Section 126, as set forth in California Statutes, First Extraordinary Session 1946, Chapter 154, page 199:

Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Board of Equalization, and the board must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each State agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Board of Equalization provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon

the clerk of the board of supervisors of each such county. The State Board of Equalization shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

Government Code, Section 113, as amended and set forth in California Statutes of 1947, Chapter 1532, page 3164:

SEC. 2. Section 113 of said code is amended to read:

113. The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been of may be ceded or conveyed to the United States, during the time the United States is the owner thereof.

APPENDIX B

FEDERAL STATUTORY PROVISIONS

The pertinent Armed Services procurement provisions are 70A Stat. 127–133, as amended, 10 U.S.C. 2301–2314. Section 2304 provides:

> 2304. Purchases and contracts: formal advertising; exceptions.
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * *
>
> (8) the purchase or contract is for property for authorized resale;
>
> (9) the purchase or contract is for perishable or nonperishable subsistence supplies;
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * *
>
> (15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the nego-

tiated price is the lowest negotiated price offered by any responsible supplier;

* * * * * *

Section 2305 provides:

* * * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

* * * * * * *

APPENDIX C

Federal Regulations

The Armed Services Procurement Regulations provide in pertinent part:[39]

> 1-301 Methods of Procurement. It shall be the objective to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered. Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent, in accordance with the policies and procedures set forth in this Regulation. Procurement shall be effected by advertising for bids and thereafter awarding a contract to the lowest responsible bidder, in accordance with the detailed requirements and procedures set forth in Section II; except that procurement may be effected by negotiation when authorized by and conducted in accordance with the detailed requirements and procedures set forth in Section III. Procurement may also be effected, as provided in Sections IV and V, by such means as coordinated procurement or interdepartmental procurement.
>
> * * * * *
>
> 1-302.2 *Sources Outside the Government.* Irrespective of whether the procurement of supplies or services from sources outside the Government is to be effected by formal advertising or by negotiation, competitive proposals

[39] The federal regulations are set forth here as they are found in the record at R. 16–22 (ASPR), 24–27 (Army), 740–743 (Air Force).

("bids" in the case of procurement by formal advertising, "proposals" in the case of procurement by negotiation) shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure such full and free competition as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the Military Department concerned, and thereby to obtain for the Government the most advantageous contract—price, quality, and other factors considered.

* * * * * *

3–100 SCOPE OF PART. This Part deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

3–101 NEGOTIATION AS DISTINGUISHED FROM FORMAL ADVERTISING. Whenever supplies or services are to be procured by negotiation, price quotations (see ASPR Section XVI, Part 2), supported by statements and analyses of estimated costs or other evidence of reasonable prices and other vital matters deemed necessary by the contracting officer, shall be solicited from all such qualified sources of supplies or services as are deemed necessary by the contracting officer to assure full and free competition consistent with the procurement of the required supplies or services, in accordance with the basic policies set forth in Section I, Part 3, to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. Negotiation shall thereupon be conducted, by contracting officers and their negotiators, with the attention being given to the following and any other appropriate factors:

(i) comparison of prices quoted, and consideration of other prices for the same or simi-

lar supplies or services, with due regard to production costs, including extra-pay shift, multi-shift and overtime costs, and any other factor relating to price, such as profits, cost of transportation, and cash discounts;

(ii) comparison of the business reputations, capabilities, and responsibilities of the respective persons or firms who submit quotations (see ASPR 1–903);

(iii) consideration of the quality of the supplies or services offered, or of the same or similar supplies or services previously furnished, with due regard to the satisfaction of technical requirements;

(iv) consideration of delivery requirements (see ASPR 1–306);

(v) discriminating use of price and cost analyses (see ASPR 16–206);

(vi) investigation of price aspects of any important subcontract;

(vii) individual bargaining, by mail or by conference;

(viii) consideration of cost sharing;

(ix) effective utilization in general of the most desirable type of contract and in particular of contract provisions relating to price redetermination (see Section III, Part 4);

(x) consideration of the size of the business concern (see ASPR 1–302.3 and 3–104);

(xi) consideration as to whether the prospective supplier is a planned producer under the industrial mobilization program;

(xii) consideration as to whether the prospective supplier requires expansion or conversion of plant facilities;

(xiii) consideration as to whether the prospective supplier is located in a surplus or scarce labor area (see ASPR 3–105);

(xiv) consideration as to whether the prospective supplier will have an adequate supply of qualified labor;

(xv) consideration of the extent of subcontracting;

(xvi) consideration of the existing and potential workload of the prospective supplier;

(xvii) consideration of broadening the industrial base by the development of additional suppliers;

(xviii) consideration of whether the contractor requires Government-furnished property, machine tools, or facilities; or Government-operated test facilities;

(xix) consideration of contract performance in facilities located in dispersed sites; and

(xx) advantages or disadvantages to the Government that might result from making multiple awards.

3–102 GENERAL REQUIREMENTS FOR NEGOTIATION. No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

(i) the contemplated procurement comes within one of the circumstances permitting negotiation enumerated in Section III, Part 2;

(ii) any necessary determinations and findings prescribed in Section III, Part 3, have been made;

(iii) such business clearance or approval as is prescribed by applicable Departmental procedures has been obtained; and

(iv) the prospective contractor has been determined to be responsible in accordance with ASPR Section I, Part 9.

* * * * * *

PROCUREMENT BY NEGOTIATION

Part 8– Price Negotiation Policies and Techniques

* * * * * *

3–801.1 General. It is the policy of the Department of Defense to procure supplies and services from responsible sources at fair and reasonable prices calculated to result in the lowest ultimate over-all cost to the Government. Sound pricing depends primarily upon the

exercise of sound judgment by all personnel concerned with the procurement.

* * * * *

Army Procurement Procedure 3-101 provides:

3-101 NEGOTIATION AS DISTINGUISHED FROM FORMAL ADVERTISING.

a. *Competition.* The fact that a procurement is to be negotiated does not relax the requirements for competition. When supplies or services are to be procured by negotiation and when consistent with the accomplishment of procurement objectives, quotations or proposals shall be solicited from all such qualified sources of (as defined in ASPR and APP *1-201.9*) supplies or services as are deemed necessary to insure effective competition and to insure that the procurement is made to the best advantage of the Government, price and other factors considered, in accordance with the basic policies set forth in Part 3, Section I, ASPR and APP. Competition is not necessary in contracting for personal or professional services.

b. *Conduct of Negotiations.* Procurement by negotiation is less automatic than, and does not have the rigid limitations of, formal advertising bid and award procedures; it allows to a greater extent than formal advertising the exercise of sound business judgment but in no way decreases the responsibility for properly protecting the interests of the Government.

(1) Contracting officers should conduct contract negotiations to the best advantage of the Government. They may bargain with any number of interested suppliers at any time prior to the award of a contract, as deemed desirable and practicable. After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform.

* * * * *

(2) Negotiation will be accomplished to the end that maximum pricing benefits from all negotiated transactions may be realized. Benefits are obtainable through complete negotiation of transactions, particularly when one or several of the proposals indicate, or it is otherwise evident, that further negotiation may result in better pricing. During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed.

(3) During the negotiation of contracts, simultaneous coordination, to the greatest practical extent, shall take place among the contracting, technical, price analysis, legal, and industrial planning personnel. Instructions to be followed by negotiating teams will be prepared with full coordination of traffic management consultants in purchasing offices, and such teams will be directed to seek traffic management advice upon the appearance of new traffic elements (such as change in shipping points, specifications, etc.) in the negotiations.

* * * * *

c. *Requests for Proposals.*

(1) When a procurement of supplies or services is to be announced in writing to prospective contractors for the purpose of requesting quotations and other terms as a basis for conducting negotiations, contracting officers shall use DD Form 747 (Request for Quotations) or a DD Form 746 (Request for Proposals and Proposal). See ASPR 16-201 and 16-203.

* * * * *

Air Force Procurement Regulation. Paragraphs 2-000, 2-101, and 2-102 provide:

2-000 Scope of Section. In recognition of the fact that formal advertising is the basic method of procurement by the Government, this Section gives detailed guidance to AF

procurement personnel for adapting formal advertising procedures to use in fulfilling as many procurement requirements as possible. In particular, Part 20 sets forth many examples of special provisions which may be incorporated in Invitations for Bids to assure that the Government's requirements will be fully met and at the same time preserve the benefits of full and free competition which are inherent in formal advertising.

PART 1—USE OF FORMAL ADVERTISING

2–101 Meaning of Formal Advertising. Formal advertising involves three basic steps. First, the preparation of an Invitation for Bids, in the prescribed form, describing the requirement of the Government accurately and completely, but avoiding any limitations which have no reasonable relationship to the actual needs of the Government and which might tend to limit the number of bidders (see AFPI 2-201). Second, publicizing the Invitation for Bids through posting in public places, distributing to prospective bidders, and such other means as may be appropriate, in sufficient time to enable prospective bidders to prepare and submit formal bids before the time slated for public opening of bids (see AFPI 2–202). Third, awarding the contract, on the basis of the bids publicly opened, to that responsive, responsible bidder whose bid is most advantageous to the Government, price and other factors considered. (See Part 4 of this Section.)

2–102 USE FOR FORMAL ADVERTISING

(a) *Statutory Requirement.* 10 U.S.C. 2304 (a) provides that all contracts for supplies or services, with certain stated exceptions, will be made by formal advertising. (See ASPR and AFPI Section III, Part 2 for discussion of the exceptions.)

(b) *House of Representatives Report.* The House Committee on Armed Services, section 2(c) of House Report No. 1688 (84th Congress, 2nd Session, January 1956) accompanying H.R. 8710, has stated as follows:

The amendment adds a new subsection. In it, we have stated positively the intention of Congress that all procurement shall be by advertised bidding. We have said, in clear language, that none of the exceptions 2(c)(1) through (17) shall be used by the agency head unless the facts and circumstances in justification thereof are clear and convincing.

We mean by this that "borderline" cases or "Grey areas," as they are sometimes referred to, and any case in doubt or uncertainty shall be resolved in favor of advertised competitive bidding and not by resorting to these 17 exceptions.

The Comptroller General, in his vigilant examination of the operation of this Act and of procurement practices generally, will, as the agent of Congress, be fully advised and fortified by this firm expression of congressional intent. And moreover, no agency head can now be in any doubt whatsoever as to what Congress expects of him. We cannot be more explicit.

We propose that the trend shall be toward advertised competitive procurement and that advertised competitive procurement will be the rule, that in every case in which the agency head or his subordinates look toward the exceptions of the Act, they are met with the expression of congressional intent in this act, as amended, that what they do must be supported by a justification which is both clear and convincing. And the Congress will examine the findings that are required under the act, from time to time, to determine whether this mandate is being followed. We are determined that

the trend which prompted this inquiry, shall be reversed.

(c) *Air Force Policy.*

(1) The AF policy is to use formal advertising procedures whenever possible notwithstanding the existence of a negotiation authority under 10 U.S.C. 2304(a) and ASPR and AFPI Section III, Part 2. Thus negotiation authority will be used only when the facts and circumstances of the procurement clearly indicate the need to use the authority. For example, 10 U.S.C. 2304(a)(9) authorizes the procurement of perishable subsistence supplies by negotiation. Milk is perishable subsistence as defined in AFR 145–11 and Rulings and Interpretations of the Walsh-Healy Public Contracts Act, but troop issue requirements are adequately covered by specifications and competition is generally available, accordingly, such procurements of milk should be advertised when volume quantities are involved.

(2) Before the negotiation authority of ASPR 3–202 or 3–210 is used, officials approving determinations and findings (see AFPI 3–306(b)) will satisfy themselves that formal advertising procedures cannot be used without detriment to the Government, and that the facts and circumstances in justification of negotiation are clear and convincing.

* * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 39

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the Northern District of California, Southern Division

REPLY BRIEF FOR APPELLANTS

The loud silences in the brief for the United States, as well as the weaknesses underlying the major premises advanced, require brief reply by state officers.

ARGUMENT

I. The Concessions Made, and the Loud Silences, in the Brief for the United States Show that the Judgment of the District Court Must Be Reversed.

Fairly read, the Brief for the United States makes the following concessions, and, by silence, leaves the following contentions of state officers unchallenged:

1. In a tacit concession of error by the district court, the government "has concluded as a matter of procurement policy not to assert immunity from these [California minimum dairy farmer milk] minimum prices but to accede to full compliance with those requirements." Brief for the United States, p. 12.

2. No claim is asserted by the United States that the California minimum dairy farmer and wholesale milk price regulations have other than even-handed application to distributors selling to the United States as contrasted to distributors selling to state and local agencies, charities, or to private retail grocery stores.

3. No claim is made by the United States that the enforcement of the California milk stabilization act against federal contractors will have any effect upon government procurement except for the resulting increase in the price of milk purchased within the State by the government. No claim is made that the state-established prices are too high or are otherwise unfair.

4. No argument is made rebutting the assertion by California that enforcement of the California milk stabilization act against contractors delivering milk to officers' clubs, post exchanges, and post restaurants, and other nonappropriated fund activities of the government, is consistent with the federal procurement function and with the federal procurement statute.

5. No answer is made to the recognition by Congress in the statutes admitting Alaska and Hawaii to statehood that the power of exclusive legislation under Article I, Section 8, clause 17,

is not per se exclusory of local law. Section 11(b), Act of July 7, 1958, 72 Stat. 347; Section 16(b), Act of March 18, 1959, 73 Stat. 11.

6. The government concedes that a state may qualify statutes tendering transfer of jurisdiction to the United States upon federal compliance with state procedures such as the necessity of filing land descriptions. Brief for the United States, pp. 31-32.

The tacit confession that the district court erred in striking down the state's dairy farmer milk price regulations, requires that the statute be declared constitutional, at least as to such regulations. The issues remaining for decision on appeal are whether the California wholesale milk price regulations may be constitutionally enforced against independent contractors with the United States under the facts of the case, and whether the district court committed prejudicial procedural error. In short, while the judgment must in any event be reversed, there remain substantial questions which require resolution by the Court on this appeal.

II. Contractors Delivering Milk to Commissary Grocery Stores, and for Troop Ration Are Not Immunized From Compliance With Local Milk Stabilization Statutes.

The thrust of the government's argument that the state's milk stabilization act is invalid as applied to federal contractors is that the federal regulations governing procurement, were formerly permissive (*Penn Dairies, Inc. v. Milk Control Comm'n*, 318 U.S. 261 (1943)), are now mandatory and in conflict with local law. Brief for the United States, pp. 58-73.

But the power to make regulations conferred by Congress upon executive officers is ". . . not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). Such regulations are valid ". . . only as subordinate rules and when found to be within the framework of the policy which the Legislature has sufficiently defined." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 429 (1933).

The statutes before the court in *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261, 276, authorizing implementing administrative regulations provided:

> "That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department: . . ." Act of April 10, 1878, 20 Stat. 36, as amended, Act of March 3, 1883, 22 Stat. 487.

1875 Revised Statutes, Section 161, provided:

> "The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it . . ."

The court in *Penn Dairies, supra*, 318 U.S. 261, 276, held that these statutes, citing 20 Stat. 36 and 22 Stat. 487, "give no hint of any delegation to the Secretary

[of War] or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price."

The statutes cited in the Federal Register as authority for the Secretary of Defense for the issuance of the current procurement regulations are Revised Statutes, Section 161, as re-enacted by the Act of August 12, 1958, 72 Stat. 547, 5 U.S.C. 22; and 10 U.S.C. 2202, 70 A Stat. 120, 32 C.F.R. p. 9; 25 F.R. 14077. Revised Statutes, Section 161, reads today the same as quoted above. 10 U.S.C. 2202 provides:

> "Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense."

It is clear, therefore, that today, as at the date of the *Penn Dairies* decision, that the statutes authorizing the issuance of procurement regulations give no hint of any delegation of power to the Secretary of Defense to "restrict the application of local regulations . . . which increase price." *Id.* 318 U.S. 261, 276.

A second complete answer is that the language of the procurement regulations quoted in the Brief for the United States, pages 106-114, give no suggestion

that state milk stabilization statutes were to be superseded.[1]

The government, unable to point to any change in the language of the federal procurement statute, simply renews the thesis, denied in *Penn Dairies*, that the local law as applied to contractors "conflicts with the federal procurement policy of free bargaining in a competitive context." Brief for the United States, p. 58. Indeed the 1962 amendments to the armed services procurement act show a Congressional intent to accommodate federal procurement to state price regulation by recognizing that prices are "set by law or regulation" for some goods and services purchased by the government. Subsection (c), Act of Sept. 10, 1962, 76 Stat. 528. Appendix p. 38, infra. The Court in *Penn Dairies* found that the statutory requirement that prices be determined in open competition was the desire in Congress "to prevent favoritism, and to give

[1] The Brief for the United States cites Armed Services Procurement Regulation, par. 1-301, on pages 64, 65 and 72, and purports to quote its provisions at page 106. The quoted language does not appear to have been published in the Federal Register. 32 C.F.R. 1.301 (published December 31, 1960, in the Federal Register, 25 F.R. 14082, deals with another subject).

Compare 32 C.F.R. 1.300-1, Regulations coming under the Federal Register Act and not published therein, are invalid against any person who has not had actual knowledge of them. Section 7, Federal Register Act, 49 Stat. 500, *Hatch v. United States*, 212 F. 2d 280 (9 Cir. 1950); *Bond v. Ballie*, 141 F. 2d 278 (D.C. Cir.), cert. denied, 323 U.S. 738 (1944).

the United States the benefit of competition"[*] rather than to "displace state regulations affecting the price of articles purchased by the government." *Id.* 318 U.S. 261, 273. It is noted that the statutory exception to the requirement of competitive bidding where local price regulations render it "impracticable to secure competition" contained in the Act of March 2, 1901, 31 Stat. 905, has been re-enacted by Congress in the existing procurement statute 10 U.S.C. 2304(a)(10). *Id.*, 318 U.S. 261, 272-273.

The suggestion that the codification of the several procurement statutes in effect in 1943 show a change in congressional intent is negatived by contemporary legislative history of the procurement act. Brief for the United States, pages 67-68. For example, Section 523 of the Department of Defense Appropriation Act, 1963, 76 Stat. 318, states:

> "Provided further, That none of the funds appropriated in this Act shall be used except that, so far as practicable, all contracts shall be awarded on a formally advertized competitive bid basis to the lowest responsible bidder."

That this language was *not* intended to require procurement officers to purchase at the lowest overall cost to the government, but just the opposite, is shown by the Senate Appropriations Committee report. S. Report No. 1578, 87th Cong., 2nd Sess., p. 9. This report states that the armed services, in order to lower

[*] See the histories of profiteering in the Revolutionary and Civil Wars, in the 1898 War with Spain and in World War I. Hearings, House of Representatives, 1935, Taking the Profits Out of War, pp. 591-616.

prices, had adopted the practice of refusing tendered sealed bids, and of thereafter "calling in the contractors or vendors and engaging in negotiation for lower prices." "This contracting practice" states the report "frequently costs the lowest bidder great additional sums of money to prepare new bid information and cost data" thereby ". . . leading to a very unstable competitive situation developing in competitive bidding practices." S. Report No. 1578, 87th Cong., 2nd Sess., p. 9. The intent of Congress that procurement procedure be fair to both the government and to the contractor, even at some additional increase in cost is shown by the statement: "The [Senate] committee [on Appropriations] emphatically disapproves of the current practice of further negotiation with related bidders to low prices after all competitive bids are received and the lowest bidder has been ascertained." S. Report No. 1578, 87th Cong., 2nd Sess., p. 9.

The same Senate report shows unmistakable congressional intent that the quoted provision in the 1963 appropriation act was not intended to supersede local milk stabilization programs. Under the heading "Recognition of State Milk Stabilization Laws," the statement is made:

> "The committee strongly urges the Department of Defense to study and report to the Committees on Appropriations of House or Senate by August 15, 1962, what action it may take to abide by the State laws in the purchase of milk for installations in the several States." S. Report No. 1578, 87th Cong., 2nd Sess., p. 10.

III. The California Milk Stabilization Act Does Not Impose a Prohibition on the National Government or Its Officers.

In support of its position that independent contractors selling milk to the United States enjoy its inherent constitutional immunity from state milk stabilization regulation, the government argues that "The degree of actual interference will vary from instance to instance. However, the controlling principle [of federal immunity] leaves no room for distinctions between different governmental functions, or for judicial appraisal of the degree of obstruction." Brief for the United States, p. 84. If this be the case, then the concession by the United States that it will not "assert immunity from these [California dairy farmer milk] minimum prices but to accede to full compliance with those requirements," is conclusive in showing that the states' minimum wholesale milk price regulations are constitutionally valid. Brief for the United States, p. 12. The major portion of any increase in procurement cost to the government due to state enforcement of the milk stabilization act against independent contractors results from his passing along to the government this increase in raw product cost. In the case of the Oakland Army Terminal, the increase to the government due to minimum dairy farmer milk prices would be 5.26 cents per quart.[1] This increase sharply contrasts to the lesser

[1] The difference between the price-war return to producers of $2.75 per hundred weight of milk (6.9 cents per qt.) and the State's dairy farmer minimum price of $5.19 (11.16 cents per qt., was brought up to 12 cents per quart. R. 681.

increase of 1.87 cents per quart which would be covered by enforcement of the minimum wholesale price regulations. R. 399-403, 420. The reason is a practical one. In order to stay in business, the distributor will have to cover his costs by his selling price. These costs are largely fixed by collective bargaining agreements (wages) or by law (electricity, water, gas, transportation, taxes).

If then, as the government tacitly concedes, there is no constitutional prohibition against enforcement of the minimum dairy farmer price regulations against independent contractors selling milk to the United States, then there is no constitutional barrier to enforcing the State's minimum wholesale price regulations against such contractors. The increase of burden on the government is much greater in the case of enforcement of the minimum dairy farmer price regulations. And, as the government says, the controlling principle leaves no room "for judicial appraisal of the degree of obstruction." Brief for the United States, p. 84.

The government's brief argues that California cannot apply its even-handed milk regulation to contractors with the United States because of the latter's inherent constitutional immunity from state regulation. Brief for the United States, pp. 73-89. "The very aim [of the state's milk stabilization statute] would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to California's distributors." *Ibid.*, p. 88.

Several comments are warranted here. First, the California distributors selling milk to federal post exchanges, officers' clubs, commissary grocery stores, and to troop messes are not federal instrumentalities, but are independent contractors. No claim is made, nor do the milk procurement contracts (R. 30-133, 251-279, 317-338, 357-363, 403-473) provide, that these distributors have the status of agents of the government to enter into contracts or to pledge its credit. c.f. *Alabama* v. *King & Boozer*, 314 U.S. 1, 13 (1941); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149 (1937). Given the absence of the philosophic limitation against regulation of the sovereign, as in the case of regulation of an independent contractor, the practical desirability of allowing a state to protect its supply of a vital food should have full sway.

Secondly, 70 percent of the milk acquired by the government at the installations here in question is purchased for resale at commissary grocery stores whose prices are fixed to return to the armed services the commissary's costs of operation. R. 643, 645, 646; Section 513, Department of Defense Appropriation Act, 1963, 76 Stat. 318. Therefore, 70 percent of any increase in procurement costs will *not* come from the federal treasury, but from the patrons of the armed services' grocery stores.

The parties respectively invoke supporting lines of precedent. On the one hand, the government cites sales tax cases in which the state law was declared unconstitutional, because the tax applied directly to the

purchaser. Where the government is the purchaser, it is constitutionally immune. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954).[3] Also cited were property tax cases where the law was struck down because the United States owned the land at the time the state taxes were assessed (*Van Brocklin* v. *State of Tennessee*, 117 U.S. 151 (1886)) and regulation cases where the state law was declared unconstitutional as an attempt to regulate federal employees while performing their official duties (*Johnson* v. *Maryland*, 254 U.S. 51 (1920); *Arizona* v. *California*, 283 U.S. 423 (1931)) and or as an attempt to regulate and tax a federal instrumentality. *Mayo* v. *United States*, 319 U.S. 441 (1942). State officers rely on the precedents upholding even-handed state regulations, where enforcement is against the independent contractor (*Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940); *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A.2d 734 (1939), appeal dismissed sub nom; *United States* v. *Baltimore & A. R. Co.*, 308 U.S. 525 (1939)), and cases sustaining non-discriminatory taxes whose legal incidence falls on the independent contractor (*Trinity Farm Co.* v. *Grosjean*, 291 U.S. 466 (1934), excise tax; *James* v. *Dravo Contracting*

[3] In *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954) and in *Livingston* v. *United States*, 364 U.S. 281 (1960), the court held unconstitutional state sales taxes which applied to direct purchases of articles by the United States. These cases come within such familiar precedents as *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886) and *United States* v. *Rickert*, 188 U.S. 432 (1903), where local taxes assessed against the property of the United States were held beyond the reach of state law.

Co., 302 U.S. 134, 160 (1937), gross receipts tax; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953) state privilege tax; *Smith v. Davis*, 323 U.S. 111 (1944), ad valorem tax on open account claim against the United States; *Alabama v. King & Boozer*, 314 U.S. 1, 9 (1941) sales tax; *Curry v. United States*, 314 U.S. 14 (1941), use tax; *City of Detroit v. Murray*, 355 U.S. 489 (1958), tax on possessory interest in federal personal property). Here state taxation has been upheld even though the economic cost of the regulation ultimately falls on the government. The exposure of the independent contractor to state taxation has been upheld even though the amount of the tax collected by the state is dollar for dollar passed on to the government (*Esso Standard Oil Co. v. Evans*, 345 U.S. 493; *Alabama v. King & Boozer*, 314 U.S. 1; *Curry v. United States*, 314 U.S. 14) and a state minimum price regulation has been upheld even though in practical effect the minimum price required to be received by the contractor fixed the floor on the price charged to the government. *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261.

The price regulation imposed by the California milk stabilization act, as interpreted by the highest state court, falls on the state licensed-independent contractor and does not apply to the transaction itself. *Pacific Coast Dairy v. Dept.*, 19 Cal. 2d 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285. The determination of legal liability under a state statute is one only a state supreme court can make with

final authority. *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261, 270; *Alabama* v. *King & Boozer*, 314 U.S. 1, 9-10. Since the person regulated under California milk stabilization act is the state licensed independent contractor, and not the government, the instant case comes within the precedents sustaining a state's even-handed regulation of independent contractors with the United States.

The government's statement that "regulation of the prices distributors may charge is direct regulation of the terms for which the federal government may negotiate; and therefore the sovereign is constitutionally immune" is simply not true, factually or legally. Brief for the United States, p. 88. First, the legal incidence of the California law does not fall upon the government, its officers, employees, or instrumentality. This puts to one side cases like *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423, and *Mayo* v. *United States*, 319 U.S. 441, where it was federal officers, or a federal instrumentality, who felt the bite of state regulation. Secondly, the class of persons regulated under the state act is not enlarged because the government contracts for the purchase of milk from an independent contractor. Only the state legislature, by amending the state statute, can shift or broaden the class of persons regulated by the milk stabilization act. The fact that the economic burden of the regulation imposed on the independent contractor is shifted to the government by reason of its contract of purchase with the contractor does not

result in an infringement of the government's immunity. *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 269.

The same argument made here was also presented to the Court in the government's brief filed in the *Penn Dairies* case. There the government stated that: "By fixing the prices which may be charged to the United States, the effect of the [Pennsylvania] Milk Control Law is the same as if the United States itself had been directly addressed by the law." Brief for the United States, O.T. 1942, No. 399, p. 27. This thesis was specifically rejected by the Court which held:

> "But those who contract to furnish supplies or render services to the government are not such [immune federal] agencies and do not perform governmental functions. . . . and the mere fact that nondiscriminatory . . . regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within implied immunity of the government from state . . . regulation." *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, 269.

Since *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261, cannot be distinguished, the government asks that the construction of the Constitution made there be overruled. Brief for the United States, p. 88. But in three succeeding cases the court has cited *Penn Dairies* with approval for the principle that nondis-

criminatory state regulation or taxation with persons who deal with the government is constitutionally permissible. *Railway Mail Assn.* v. *Corsi*, 326 U.S. 88, 95 (1945); *Mayo* v. *United States*, 319 U.S. 441, 447 (1943); *United States* v. *City of Detroit*, 355 U.S. 466, 474 (1937). The court in *California Comm'n* v. *United States*, 355 U.S. 534 (1958), a case involving an unconstitutional burden on the federal transportation procurement function, took pains to distinguish the cases upholding nondiscriminatory state taxation and regulation of persons dealing with the government, e.g., *Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495; *Smith* v. *Davis*, 323 U.S. 111; *Alabama* v. *King & Boozer*, 314 U.S. 1; *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A.2d 734, appeal dismissed, 308 U.S. 94; *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94; *Penn Dairies* v. *Milk Control Comm'n*, 318 U.S. 261; and *California Comm'n* v. *United States*, 355 U.S. 466, 543.

What the government is really asking is that the doctrine of intergovernmental immunities be partially reinstated so that a state's power to tax or regulate anyone dealing with the government is nullified whenever the federal treasury is even remotely affected. *Gillespie* v. *Oklahoma*, 257 U.S. 501 (1922), disapproved in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365 (1949); *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218 (1928); and *Graves* v. *Texas Co.*, 298 U.S. 393 (1936) disapproved in *Alabama* v. *King & Boozer*,

314 U.S. 1, 9 (1941). The California milk stabilization act affects the procurement cost of but one food item, milk, of many purchased by the government. Seventy-percent of any such increase will be borne by patrons of the commissary grocery stores, not the Treasury of the United States. Section 513, Department of Defense Appropriation Act 1963, 76 Stat. 318. R. 643, 645, 646. Concededly, California has a special interest in protecting its supply of this vital but perishable food. The argument that this slight additional procurement cost, constituting but 30 percent of any total increase, is not the normal incident of the organization within the same territory of two independent sovereigns, is not worthy of the executive department of a great nation. If federal contracting officers need more protection from state regulation of persons dealing with the government than the Congress has heretofore accorded, it does not follow they need this protection from the Court. They may obtain relief from Congress.

IV. Article I, Section 8, Clause 17, of the Constitution Is Not per se Exclusory of Local Law.

The government's argument, in effect, substitutes the phrase "exclusive jurisdiction" for the phrase in Article I, section 8, clause 17 of the Constitution which grants Congress the "power . . . to exercise exclusive legislation." Brief for the United States, p. 26. This labored construction is neither supported by the legislative history of Section 17, nor is it consist-

ent with declared public policy. The appellee makes no comment about the debates in the constitutional convention of 1787 which indicate that the consent requirement was intended to be a condition precedent to the purchase of land for the erection of forts and arsenals. *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525,536 (1883). Instead, the government refers to the later (1788) *Federalist*, No. 43, by James Madison, first printed in the *Independent Journal*, and later as published by J. and A. McLean of New York. The *Federalist*, edited by Henry Cabot Lodge, 1888, Introduction, p. xxxvi. The court has previously stated that the individual views of Senators or Congressmen expressed in congressional debate on pending measures do not furnish a firm ground for their proper construction. *Maxwell* v. *Dow*, 176 U.S. 581, 601-602 (1900); *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72,79 (1875); *Aldridge* v. *Williams*, 3 How. 9, 24 (1824). Partisan views expressed a year later in the *Federalist* should therefore not have probative value.

On the merits, Madison's arguments merely show a need for federal supremacy, not exclusive federal jurisdiction. The statement is made that "the public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular State." The *Federalist*, op. cit. p. 268. But even in the absence of exclusive jurisdiction, state authority can be exercised only where consistent with the free and effective federal use of such land. *Fort Leavenworth R.R. Co.*

v. *Lowe*, 114 U.S. 525, 539 (1895). Further, federal authority to pre-empt the application of state law to federally owned land is found in the Constitution, Article IV, Section 3, clause 2; *Utah Power & Light Co. v. United States*, 243 U.S. 389,405 (1917). Absolutely no showing is made that the plenary authority of Congress under the Supremacy Clause, the clause authorizing the regulation of federal land (Art. IV, Sec. 3, Cl. 2) and the power to exclusive legislation clause (Art. I, Cl. 8, Sec. 17), need be augmented by the per se exclusion of state law through application of the concept of exclusive jurisdiction.

The regulations of the Department of the Army state:

> "As a general rule, the Department of the Army will not seek Federal jurisdiction over Army-controlled real estate.
>
> . . . Prior to the initiation of requests for such jurisdiction, the following will be considered: (1) That in most instances, even without any measure of Federal jurisdiction, the Federal Government is legally insulated from any State or local interference with the use of Government property such as would impede the Federal mission carried out thereupon. (2) That the acquisition of exclusive Federal jurisdiction entails many disadvantages, principally the loss of State or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile, otherwise establishable by inhabitants of the installation, such as

attendance at State or local schools," right to vote," and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarizations, and inquests."[5] Army Regulation 405-20, August 14, 1961; Appendix pp. 36-37, infra.

This 1961 Army regulation follows the policy elaborated by the President's Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States that: ". . . it is desirable that the Federal Government not receive, or retain, any measure whatever of legislative jurisdiction but that it hold the [federally owned] installations and areas [located outside the District of Columbia] in a proprietorial interest status only, with legislative jurisdiction remaining in the several States: . . ." Jurisdiction Over Federal Areas Within the States, Government Printing Office, 1956, Part I, p. 70.

This policy in the executive department to neither receive nor retain exclusive jurisdiction has been accompanied by a similar policy in Congress. Thus in the

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[5] *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 449, 100 A.2d 621 (1953); Opinion of the Justices, 42 Mete. 580 (Mass. 1841).

[6] Kansas: *State v. Corcoran*, 155 Kan. 714, 128 P.2d 909, 1004 (1942).
New Mexico: *Arledge v. Mabry*, 52 N.M. 303, 197 P.2d 884, 892 (1948).
South Dakota: *McMahon v. Polk*, 10 S.D. 296, 73 N.W. 77 (1897).
Tennessee: *State v. Willett*, 117 Tenn. 334, 97 S.W. 299 (1906).
Rhode Island: 1845 Constitution of Rhode Island, Article II, Section 5.
California: contra, *Arapaiolu v. McManamin*, 113 C.A.2d 824, 249 P.2d 318 (1952).

[7] *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729 (1926).

statutes admitting Alaska and Hawaii to statehood, Congress expressly provided that state law should become effective in military areas subject to its power of exclusive legislation until superseding federal legislation were enacted. Section 11(b), Act of July 7, 1958, 72 Stat. 347; Section 16(b), Act of March 18, 1959, 73 Stat. 11-12. See also the retrocession of jurisdiction made to Virginia, with a reservation of the power of exclusive legislation made in the Act of February 23, 1927, 44 Stat. 1176.

In order to avoid the conclusion that the congressional power of exclusive legislation is not per se preemptive of state law, a conclusion directly suggested by these executive statements of policy, the government argues that "California may no more legislate over land purchased with its consent within its borders than Maryland may legislate over the District of Columbia." Brief for the United States, p. 32. The legislative history of the District of Columbia, though, shows that Maryland made an express statutory cession of exclusive jurisdiction of the existing district to the United States. Congress by the Act of July 16, 1790, 1 Stat. 130, authorized the purchase of land for a permanent seat of government, but also provided that the operation of state laws should continue in effect over such land "until Congress shall otherwise by law provide." Thereafter in Chapter 55, 1791 Laws of Maryland, effective December 19, 1791, the State of Maryland ". . . ceded and relinquished to the congress and government of the United States, in full and absolute right, and exclusive jurisdiction" that part of

the state called Columbia. This tender of cession of exclusive jurisdiction was accepted by the Congress by the Act of February 27, 1801, 2 Stat. 103, the acceptance providing "that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district [of Columbia], which was ceded by that state to the United States . . . ." See *Morris v. United States*, 174 U.S. 196, 198-200 (1899). Thereafter the Congress enacted its own municipal law for the district by the creation of a police force (Act of August 6, 1861, 12 Stat. 320), and by establishing a territorial government, Act of February 21, 1871, 16 Stat. 419. This legislative history shows that exclusive federal jurisdiction over the District of Columbia was created by an express cession of that exclusive jurisdiction by the State of Maryland, and its express acceptance by the Congress. In sharp contrast, there has been no express cession of jurisdiction over the Travis, Castle, and Oakland bases by the State of California. Therefore, the jurisdictional status of these bases and of the District of Columbia are not comparable.

Two observations may be made about the expressions of opinion in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, and *Surplus Trading Co. v. Cook*, 281 U.S. 647, cited by appellee for the proposition that Article I, Section 8, clause 17, is *per se* preemptive of state law. Brief for the United States, pp. 26-29. First, the state statutes construed in these cases were respectively a cession statute (1875 Laws of

Kansas, p. 95), and a statute which both ceded state jurisdiction and granted the state's consent to purchase. Arkansas Acts of 1903, p. 346. Secondly, the opinions in both cases assumed that a state could not constitutionally make a reservation of state authority in a statute transferring state jurisdiction to the United States because the power of Congress under clause 17 could be exercised exclusively. These statements in *Fort Leavenworth* and *Surplus Trading* were deemed *obiter dictum* and disapproved in *James v. Dravo Contracting Co.*, 302 U.S. 134, 146-147. Therefore, the reiteration in the brief for the United States of these discredited statements from the *Fort Leavenworth* and *Surplus Trading* cases does not advance the thesis put forward by the government.

The government, on page 45 of its brief, characterized *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, as holding that the United States had acquired jurisdiction over Moffett Field by purchasing the land there with the consent of the State. To the contrary, the State in *Pacific Coast Dairy*, by filing a demurrer in the Supreme Court of California, admitted provisionally, for testing the question of law involved, the allegation in the complaint that the United States exercised jurisdiction over Moffett Field. Brief for Appellees, O.T., 1942, No. 275, p. 3. The Court apparently assumed from this concession that the United States had filed land descriptions of Moffett Field under the State's 1897 cession statute since chief reliance was made in the opinion on *Standard Oil Co. v. California*,

291 U.S. 242, and on *Consolidated Milk Producers* v. *Parker*, 19 C.2d 815, 123 P. 2d 440. *Pacific Coast Dairies* v. *Dept.*, 318 U.S. 285, 292, 293 fn. 8. In both the *Standard Oil* and *Consolidated* cases, land descriptions of the military base involved had been recorded by the government under California Statutes of 1897, Chapter 56, p. 51, and a cession thereby obtained.

This analysis both of the history of Article I, Section 8, clause 17 in the constitutional convention, and contemporary policy considerations attendant to its construction, compel the conclusion that the power in Congress to exercise exclusive legislation over federal military lands constitutes a separate but supreme power in Congress which becomes effective to displace local law only as Congress exercises this authority.

V. The Subsequent (1897) California Cession Statute Qualified the Earlier (1872) Consent Statute, and by Failing to Record Land Descriptions as Required by the 1897 Statute, the United States Did Not Acquire Jurisdiction at Castle, Travis or the Oakland Bases.

The Court need not reach the issue, much mooted by the parties, as to whether Article I, Section 8, clause 17, is *per se* preemptive of state law if it determines that the State's 1872 consent to purchase statute was qualified by the subsequent 1897 statute. This latter act, Statutes of 1897, Chapter 56, page 51, required the filing of land descriptions as a condition precedent to the transfer of jurisdiction over "all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or

defense, or which may hereafter be ceded or conveyed to said United States for such purposes; . . ."

More sweeping language cannot be imagined. "*All*" lands of the government include public domain reserved from entry, lands held, and lands occupied by the government on March 2, 1897. Also covered were all lands *ceded or conveyed* to the United States after March 2, 1897. This language covered the only two ways the government could obtain title: (1) by cession from another sovereign (e.g. Treaty of Guadalupe Hildalgo, 9 Stat. 922), and (2) by conveyance under a judgment in condemnation or a transfer of title by purchase. *Kohl* v. *United States*, 1 Otto 367, 374. The inclusion of all lands used for "military purposes or defense" clearly includes all types of military installations now located in California. In short, the 1897 statute covered the field of jurisdiction and thereby qualified the terms of the earlier 1872 statute.

The government is also in error with regard to the legislative objective of the 1897 statute. It was not intended to create an "alternative method of transferring jurisdiction." Brief for the United States, p. 49. Instead, its legislative purposes were: first, to require the filing by the United States of a public notice evincing the assumption of jurisdiction by the government, and the giving of record notice to the world of this fact, and second, to accurately describe in a recorded notice by metes and bounds, and by plat, the area taken into federal jurisdiction. By such a requirement, the state could avoid the creation of juris-

dictional "no-man's land" within the state borders. See *Valley County* v. *Thomas*, 109 Mont. 345, 97 P. 2d 345, 360 (1939). Compare *State* v. *Tully*, 31 Mont. 365, 78 Pac. 760 (1904) with *United States* v. *Tully*, 140 Fed. 899 (C.C.D. Mont. 1905).

Congress adopted this same notice requirement in amending Section 355, Revised Statutes, by the Act of October 9, 1940, 54 Stat. 1083, to provide that: "it shall be conclusively presumed" that jurisdiction has not been accepted by the United States unless exclusive or partial jurisdiction were accepted "by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated." The government in its brief in *Adams* v. *United States*, O.T. 1942, No. 889, at pages 16-18, acknowledged that Congress intended by its statute to incorporate the notice and recording provisions of existing state law in order to reduce the existing jurisdiction confusion, saying: ". . . all confusion should be eliminated by requiring an unequivocal act of acceptance, such as the filing of a notification with the Governor of the State which had already been required by some state statutes[8] or by compliance with any other equivalent procedure which the states might provide, such as the recordation of maps or plats."[9]

[8] Art. 1639, 1849 Laws of Texas, land descriptions and plats to be filed with governor.

[9] Sec. 20, 1917 Stats. of Washington; Sec. 1, Ch. 110, 1895 Acts of Term.; Sec. 2, Ch. 23, 1921 Stats. of Nevada; Calif. Stats. 1897, Ch. 56, p. 51, land descriptions and plats to be filed in local offices of record.

The appellee's reply to this contention is one of confession and avoidance. Confession is made that "a State may in fact condition its grant of consent to the federal purchase of land within its borders." Brief for the United States, pp. 46-47. Avoidance of the proposition that the 1872 statute was qualified by the later 1897 statute is attempted through citation of the opinion of a previous Attorney General of California in 23 Ops. Cal. Atty. Gen. 14. This opinion concerned two tracts of land at Fort Ord, Monterey County, California. One tract of 15,809 acres had been purchased by the United States in 1917 and an adjoining tract of 13,801 acres was purchased by the government between 1940 and 1943. The opinion reached the conclusion that jurisdiction over the parcels purchased in 1917 passed to the United States by virtue of the filing of metes and bounds descriptions pursuant to the 1897 statute, because these lands were "taken for military purposes or defense *other* than the [Art. I, Sec. 8, cl. 17] constitutionally designated purposes" (emphasis added). 23 Ops. Cal. Atty. Gen. 14, 19. The amazing conclusion was also reached that some unknown degree of jurisdiction over the areas purchased between 1940 and 1943 passed to the United States even though no property descriptions had been filed as required by the 1897 statute, because these lands had been taken for "constitutionally designated [military] purposes" under the 1872 statute. 23 Ops. Cal. Atty. Gen. 14, 19. No explanation was made, or could be made, as to why the lands acquired at Fort

Ord from 1940 to 1943 was purchased for "constitutionally designated purposes," while the lands acquired for use as part of the same military reservation in 1917 were purchased "for military purposes or defense other than constitutionally designated purposes." No rational reason supports the concept that some military lands are Article I, Section 8, clause 17 lands, but that other adjacent military lands are without the scope of clause 17. Therefore, the resulting conclusion in 23 Ops. Cal. Atty. Gen. 14, that the 1897 statute does not qualify the 1872 statute, is untenable. See *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 142, where the court refused to apply the rules of *ejusdem generis* in the construction of clause 17, and instead, adopted the broad construction that locks and dams came within clause 17 because "of the nature and functions of the national government which the Constitution established."

Understandably, the government cites only the holding, and not the reasoning of 23 Cal. Ops. Atty. Gen. 14. What the United States does maintain is that military lands purchased by the government under the 1872 statute are not "conveyed" to it within the meaning of the 1897 statute. Brief for the United States, pp. 46-53. But, as previously noted the term "conveyed" denotes a transfer of land pursuant to a purchase. See *Kohl* v. *United States*, 1 Otto 367, 374 (1876); *Seal of Gold Mining Co.* v. *Slater*, 161 Cal. 621, 630, 120 Pac. 15 (1911). Undoubtedly it was this construction of the phrase "conveyed" in the 1897

statute which led the Attorney General of California in opinion V.S. 3188, January 16, 1941, to express the view that the government did not obtain jurisdiction under section 34, 1872 Political Code, over a 15-acre tract of land on Government Island in the Oakland estuary purchased in 1930, and did not obtain jurisdiction under Statutes of 1897, Chapter 56, page 51, until land descriptions were recorded with the Alameda County Recorder's Office in 1940 as required by the 1897 statute.

The Judge Advocate General of the Army was also troubled by this question on which successive Attorneys General of California disagreed. In opinion J.A.G.R. 1954 2153, he reaffirmed the conclusion of an earlier opinion S.P.J.G.R. 1945 9595 that:[3]

> ". . . previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure [Section 114] [[Government Code]] will accomplish the desired objective of removing all doubt in the matter."

In the resolution of this issue, the construction that the government must file metes and bounds land descriptions before obtaining jurisdiction from the state, accords with the practical necessity the public officers, federal and state, would thereby be enabled to easily

[3] The full text of J.A.G.R. 1954 2153 is set forth in the Appendix at pp. 42-45, infra. See SPJGR 1945 9595, appendix p. 45, infra.

and accurately determine the scope of the respective federal and state territorial jurisdictions.

CONCLUSION

For the reasons stated, the judgments below must be reversed.

Respectfully submitted,

STANLEY MOSK, Attorney General
of the State of California

LAWRENCE E. DONSEE
Deputy Attorney General

JOHN FOURT
Deputy Attorney General
Attorneys for Appellants

ROGER KENT
Of Counsel

APPENDIX

I. 1962 Amendments to the Armed Services Procurement Act. 76 Stat. 528.

"Title 10 of the United States Code is hereby amended as follows:

(a) Subsection 2304(a) is amended to read as follows:

"(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—".

(b) Subsection 2304(a) (14) is amended to read as follows:

"(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising would be likely to result in additional cost to the Government by reason of duplication of investment or would result in duplication of necessary preparation which would unduly delay the procurement of the property;".

(c) Section 2304 is amended by adding a new subsection as follows:

"(g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit,

b. Chief of Engingers. The Chief of Engineers will—

(1) Evaluate each request in the light of the policy described in paragraph 3 and refer it through The Judge Advocate General to the Deputy Chief of Staff for Logistics with comments and recommendations for determination of the Army positions.

(2) In the event of a determination to annex, instruct the appropriate Division or District Engineer to communicate with the local government or agency involved and to execute the required consent to or petition for annexation. The requesting Army element will be advised concerning determination of the Army position.

(3) Maintain records pertaining to annexation of Army installations, and upon request provide information thereof.

(4) Furnish a copy of documents evidencing annexation to the Judge Advocate General; the Army commander or chief of technical service; and the installation commander.

[AG 680.2 (9 Jun 61) ENGRE]

BY ORDER OF THE SECRETARY OF THE ARMY:

G. H. DECKER,
General, United States Army,
Chief of Staff.

Official:

R. V. LEE,
Major General, United States Army,
The Adjutant General.

III. Opinion of the Judge Advocate General, JAGR 1954/2153, Department of the Army.

6802 ENGLM
STATE OF CALIFORNIA 1st Ind
(B L 9 Feb 54)

SUBJECT: Status of Federal Jurisdiction Over Military Reservations in the State of California

DA, OCofEngrs, Washington 25, DC, 19 Feb 1954

To: The Judge Advocate General,
Department of the Army
ATTN: Lands Division

1. Reference is made to 1st indorsement from your office dated 23 October 1945, file SPJGR 1945 9595.

2. The question considered in the abovementioned indorsement was whether it would be necessary or desirable to comply with the filing provisions of Section 114 of the California Government Code, approved 13 April 1943 and effective 4 August 1943, with respect to military lands acquired prior to 4 August 1943. It was recommended by your office that "previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure [Section 114] will accomplish the desired objective of removing all doubt in the matter."

3. As indicated in the inclosed copy of opinion (No. 53/20) dated 8 January 1954, the Attorney General of the State of California is of the opinion that the United States obtained Federal jurisdiction over lands

within the Fort Ord Military Reservation, and presumably over other military lands within the State of California, acquired prior to 21 May 1946 (the effective date of the adoption of Section 126 of the Government Code), by virtue of the provisions of an 1872 statute which became Section 34 of the Political Code of the State of California and, as amended in 1939, ultimately became Section 111 of the Government Code. The statute, prior and subsequent to amendment, was in effect concurrently with the 1897 statute, which ultimately became Section 114 of the Government Code, until the repeal of both statutes on 19 September 1947. On the latter date, Section 126 of the Code, as amended, became the exclusive and definitive procedure for obtaining Federal jurisdiction (Cal. Const., Art. IV, Sec. 1; Cal. Statutes 1947, ch. 1532 sec. 1, 3).

4. In view of the foregoing, an opinion is requested with regard to the following:

a. Whether Sections 111 and 114 of the Government Code of the State of California provided optional and definitive procedures for obtaining Federal jurisdiction until 21 May 1946, the effective date of the adoption of Section 126.

680.2 ENGLM
STATE OF CALIFORNIA
(B. L. 9 Feb 54)

SUBJECT: Status of Federal Jurisdiction Over Military Reservations in the State of California

b. Whether the scope of Federal jurisdiction conferred under former Section 111 of the Government Code was coextensive with or less extensive than that conferred under Section 114.

c. Whether this office should continue to follow the procedure outlined in the abovequoted recommendation.

For the Chief of Engineers:

s H V Canny
Colonel, Corps of Engineers
Assistant Chief of Engineers
for Real Estate

1 Incl
n/c

JAGK 1954 2153
(9 Feb 54) 2d Ind 9 APR 1954

Subject: Jurisdiction — Military Reservations in State of California. Dept of the Army, Judge Advocate General's Office, Washington 25, D. C.

To: The Chief of Engineers, Room 7338, Bldg T-7, Gravelly Point, Va.

This office adheres to the views expressed in the opinion cited in paragraph 1 of 1st indorsement. The questions asked in paragraphs 4a and 4b therefore require no answer. In answer to the question raised in paragraph 4c, it is the opinion of this office that the mentioned procedure should be followed.

For the Judge Advocate General:

s Byrne F. Bentley
Lieutenant Colonel, JAGC
Chief, Lands Division

1 Incl
n/c

proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured; and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: *Provided, however*, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion."

(d) The second sentence of subsection 2306(a) is amended by substituting "(f)" for "(e)".

(e) Section 2306 is amended by adding a new subsection as follows:

"(f) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of his knowledge and belief, the cost or pricing data he submitted was accurate, complete and current—

"(1) Prior to the award of any negotiated prime contract under this title where the price is expected to exceed $100,000;

"(2) Prior to the pricing of any contract change or modification for which the price adjustment is ex-

pected to exceed $100,000, or such lesser amount as may be prescribed by the head of the agency;

"(3) Prior to the award of a subcontract at any tier where the prime contractor and each higher-tier subcontractor have been required to furnish such a certificate, if the price of such subcontract is expected to exceed $100,000; or

"(4) Prior to the pricing of any contract change or modification to a subcontract covered by (3) above, for which the price adjustment is expected to exceed $100,000 or such lesser amount as may be prescribed by the head of the agency.

"Any prime contract or change or modification thereto under which such certificate is required shall contain a provision that the price to the Government, including profit or fee, shall be adjusted to exclude any significant sums by which it may be determined by the head of the agency that such price was increased because the contractor or any subcontractor required to furnish such a certificate, furnished cost or pricing data which, as of a date agreed upon between the parties (which date shall be as close to the date of agreement on the negotiated price as is practicable), was inaccurate, incomplete or noncurrent: *Provided*, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, *prices set by law or regulation* or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such determination." (emphasis added).

(f) The first sentence of subsection 2310(b) is amended to read as follows:

"Each determination or decision under clauses (11)–(16) of section 2304(a), section 2306(c), or section 2307(e) of this title and a decision to negotiate contracts under clauses (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that (1) are clearly illustrative of the conditions described in clauses (11)–(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) clearly indicate why advance payments under section 2307(e) would be in the public interest, or (4) clearly and convincingly establish with respect to the use of clauses (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), that formal advertising would not have been feasible and practicable."

(g) Section 2311 is amended to read as follows:

"§ 2311. Delegation

"The head of an agency may delegate, subject to his direction, to any other officer or official of that agency, any power under this chapter except the power to make determinations and decisions under clauses (11)–(16) of section 2304(a) of this title. However, the power to make a determination or decision under section 2304(a)(11) of this title may be delegated to any other officer or official of that agency who is responsible for procurement, and only for con-

tracts requiring the expenditure of not more than $100,000."

(b) The amendments made by this Act shall take effect on the first day of the third calendar month which begins after the date of enactment of this Act."

Act of September 10, 1962, 76 Stat. 528.

New subsection 10 U.S.C. 2306(f), incorporating the provisions of 32 C.F.R. 7.104-29, requires that the government receive cost data on non-competitive negotiated procurement except where the price negotiated is based on ". . . prices set by law or regulation. . . ." This statutory exception shows congressional acceptance of the fairness of state regulated prices and that such local laws are compatible with federal procurement. S. Report No. 1884, 87th Cong., 2nd Sess., pp. 2-3. See *Penn Dairies* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944). The legislative history of these amendments set forth in S. Report No. 1884 and H. Report No. 1638, 87th Cong., 2nd Sess., show that Congress intended thereby to emphasize that the military departments use formal advertising in procurement, unless circumstances exist which would justify procurement by negotiation. It is noted that section 2304(g), as amended, recognizes that some "rates or prices" of goods and services purchased by the government are fixed by law, and shows a Congressional intent that federal procurement be accommodated within state price fixing laws.

II. Regulation 405-20, August 14, 1961, Department of the Army

AR 405-20

TAGO 7318 A, 68047 61

ARMY REGULATIONS

No. 405-20

HEADQUARTERS,
DEPARTMENT OF THE ARMY
WASHINGTON 25, D.C., 14 August 1961

REAL ESTATE

FEDERAL JURISDICTION, AND ANNEXATION

	Paragraph
Purpose and scope	1
Policy on jurisdiction	2
Policy on annexation	3
Acquisition of jurisdiction	4
Retrocession of jurisdiction	5
Annexation	6

* These regulations supersede AR 405-20, 21 April 1955.

1. Purpose and scope. These regulations set forth the policies, basic procedures, and responsibilities concerning acceptance and retrocession of Federal jurisdiction over real estate, and the annexation by local governments and agencies of real estate, located within the several States and under the control of the Department of the Army.

2. Policy on jurisdiction. The following policies will govern decisions concerning the acceptance and retrocession of Federal jurisdiction:

a. As a general rule, the Department of the Army will not seek Federal jurisdiction over Army-controlled real estate.

b. Concurrent jurisdiction may be accepted where it is found necessary that the Federal Government furnish or augment law enforcement otherwise rendered by a State or local government. These circumstances might exist where the Army installation is of

great size, large population, or is in remote location, or because of peculiar requirements stemming from Army use, it is beyond the capacity of State or local government to render suitable service. When the acceptance of such jurisdiction is contemplated, it is desirable (if State law so permits) that—

(1) State laws and judicial and administrative authority will continue to apply with respect to taxation, marriage, divorce, attainment, adoption, commitment of mentally incompetent, descent, and distribution of property, notarizations, and inquests.

(2) The State will retain concurrent power to enforce the criminal law and to execute on the installation any civil or criminal process.

(3) Inhabitants of the installation will not thereby be deprived of any civil or political rights, especially rights to vote, and to attend State or local schools.

(4) There will be excluded from the acceptance, wherever possible and reasonable, Federal jurisdiction over public roads traversing the installation and over areas not lying within the perimeter of the main installation.

c. Exclusive jurisdiction may be accepted in those few instances where the peculiar nature of the military operation necessitates greater freedom from State and local law, or where the operation of State or local laws may unduly interfere with the mission of the installation. Prior to the initiation of requests for such jurisdiction, the following will be considered:

(1) That in most instances, even without any measure of Federal jurisdiction, the Federal Government is legally insulated from any

State or local interference with the use of Government property such as would impede the Federal mission carried out thereupon.

(2) That the acquisition of exclusive Federal jurisdiction entails many disadvantages, principally the loss of State or local fire, police, and sanitation services, and the denial of rights incident to residence or domicile, otherwise establishable by inhabitants of the installation, such as attendance at State or local schools, right to vote, and access to the authority of State or local courts, officials, or laws in matters relating to probate, domestic relations, notarization, and inquests.

d. In any event, no request for the acceptance of exclusive jurisdiction will be made unless—

(1) It is considered that the principle cited in *c*(1) above is inapplicable, impracticable of application, or that the interests of the Federal Government are not adequately protected thereunder;

(2) The possible disadvantages mentioned in *c*(2) above have been examined and weighed against the benefits expected to attach to the acceptance of exclusive jurisdiction;

(3) There is excluded from the acceptance, wherever possible and reasonable, Federal jurisdiction over public roads traversing the installation and over areas not lying within the perimeter of the main installation, and, wherever possible, reservations are made so as not to deprive inhabitants of the installation of any or all of the incidents of residence or domicile.

It is Department of the Army policy to retrocede unnecessary Federal jurisdiction to the States as expeditiously as practicable.

3. Policy on annexation. *a.* The annexation of land is governed by State law. It has no effect on Federal legislative jurisdiction, but is merely an adjustment of political boundaries within the State which does not interfere with Federal activities or functions. Some State laws permit annexation of land without consent of the owner. These regulations only concern annexation of fee-owned lands under State statutes which require the consent of or a petition from the Department of the Army as owner.

b. As a general rule, the Department of the Army will consent to or petition for annexation under circumstances indicating a resultant benefit to the land, to efficiency of land management, to its personnel, and or to the community. Possible advantages to the Army in its proprietorial status are police and fire protection; purchase of water, sewerage disposal, and other utilities at lower rates; maintenance of public roads, etc.

4. Acquisition of jurisdiction. *a. Army commanders or chiefs of technical services.* Army commanders or chiefs of technical services may initiate requests for acceptance of Federal jurisdiction over Department of the Army installations under their control. These requests will be made to the Chief of Engineers and will include the following:

(1) Reasons for requesting that jurisdiction be obtained, with appropriate indication that the policies expressed in paragraph 2 have been duly considered.

(2) Advice as to whether the installation involved is to be retained as a permanent military installation.

(3) Description of the land in sufficient detail to insure identification.

b. Chief of Engineers. The Chief of Engineers will—

(1) Evaluate each request in the light of the policy described in paragraph 2 and refer the request through The Judge Advocate General to the Deputy Chief of Staff for Logistics with comments and recommendations for determination of the Army position.

(2) Prepare jurisdiction assemblies for submission through The Judge Advocate General to the Secretary of the Army.

(3) Process all documents necessary to accomplish acquisition of jurisdiction.

(4) Maintain informational records pertaining to Federal jurisdiction over Army installations, and provide information thereof to all elements of the Army or to other Government agencies, in respect to matters for which he is responsible.

(5) Forward to The Judge Advocate General the copy of the acceptance document which bears the formal receipt of the proper State official, and furnish one additional copy to the Army commander or chief of technical service, the installation commander, and the Department of Justice.

5. Retrocession of jurisdiction. Army commanders or chiefs of technical services will initiate requests

for retrocession of Federal jurisdiction where in their opinion such action is considered to be to the Government's interest or where retention of Federal jurisdiction is considered unnecessary. Such requests will be addressed to the Chief of Engineers and will include reasons for requesting retrocession, together with a general description of the land involved in the proposed retrocession. The Chief of Engineers will evaluate such requests and refer them through The Judge Advocate General to the Deputy Chief of Staff for Logistics for determination of the Army position. Where it is decided that retrocession is in the best interests of the Government the Chief of Engineers will draft and submit through The Judge Advocate General to the Secretary of the Army such Federal and State legislation as may be necessary to accomplish retrocession. The Judge Advocate General will review such proposed legislation for form and legal sufficiency. Upon enactment of the Federal and State legislation, the Chief of Engineers will take such action as is appropriate to accomplish retrocession of jurisdiction and advise the Secretary of the Army. The Judge Advocate General, the Army commander, chief of technical service, installation commander, and the Department of Justice, of such action.

6. Annexation. *a. Army commanders or chiefs of technical services.* Army commanders or chiefs of technical services will transmit to the Chief of Engineers requests for annexation of Department of the Army installations under their control, and may themselves initiate such requests. These requests will include the information required in preceding paragraph 4 with respect to requests for acquisition of jurisdiction, with appropriate indication that the policy expressed in paragraph 3 has been considered.

IV. Opinion of the Judge Advocate General, SPJGR 1945 9595, Department of the Army.

SPJGR 1945 9595 1st Ind 23 October 1945
Hq ASF, JAGO, Washington 25, D. C.

To: Chief of Engineers, Room 1255, New War Department Building

With reference to your basic letter dated 30 August 1945 it is recommended that the transmission of the list of military reservations in the State of California therein inclosed and returned herewith be deferred at this time.

Chapter 134, Statutes of California, 1943, approved 13 April 1943 and effective 4 August 1943, establishing the California Government Code, contains the following sections:

> "111. The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards and other needful buildings, reserving authority to serve and execute process and the State's entire power of taxation as provided in this article.
>
> * * * * * *
>
> "114. The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of

record in the county in which the lands are situated."

The provisions of section 114 of the Government Code, except for the reservation of the power of taxation, were taken from the act of 2 March 1897 (Cal. Stats. 1897, ch. 56). Prior to the enactment of section 114 this office expressed the opinion that the provisions of the act of 2 March 1897 with respect to the filing of maps and metes and bounds descriptions need not be complied with as to lands acquired subsequent to the effective date of chapter 710, California Statutes, 1939 (SPJGR 1943 3251, 27 March 1943). However, the continuance thereof, with the exception above indicated, as section 114 of the Government Code leaves little doubt as to the necessity of complying with its provisions with regard to land acquired subsequent to the effective date of 4 August 1943. The only doubt in the matter arises with reference to the meaning and scope of the words "ceded or conveyed", and this doubt should be resolved by the filing of maps and metes and bounds descriptions. As to any lands acquired prior to the effective date of section 114 of the California Government Code, this office adheres to its prior opinion of 27 March 1943, *supra*. Nevertheless it now appears that the legislature has treated and considered the act of 2 March 1897 to have been in full force and effect up to 4 August 1943 since pursuant to title 50, section 500000 of the Government Code the act of 2 March 1897 is expressly repealed. This indicates an expression that said act was effective and existent preceding its repeal. To eliminate any uncertainty concerning the status of these previously acquired lands and to discourage the possibility of needless

litigation, it is recommended that the provisions of section 114 of the Government Code should be complied with as to such prior acquisitions. In this connection, it is noted that this code section expressly applies to "all land * * * conveyed to the United States * * *."

The following procedure is recommended: The provisions of section 114 of the Government Code with respect to the filing of maps and metes and bounds descriptions should be complied with both as to lands acquired prior and subsequent to the effective date thereof. Following the filing of such maps and metes and bounds descriptions appropriate letters to the Governor accepting jurisdiction over such lands should be prepared and dispatched. Under the present state of the law it is believed that previous letters of acceptance addressed to the Governor accepting jurisdiction unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient to vest jurisdiction in the United States over the lands intended to be covered thereby and that the foregoing procedure will accomplish the desired objective of removing all doubt in the matter.

For the Judge Advocate General:

(Signed)

Joseph H. Davis
Colonel, JAGD
Chief, Military Reservations Division

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